Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ADVANCE SECURITY, INC. and
FIGGIE INTERNATIONAL INC.,
Petitioners,

v.

MARILYN M. MULHALL,
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

EDWARD KATZE
(Counsel of Record)
CONSTANGY, BROOKS & SMITH
230 Peachtree Street, N.W.
Suite 2400
Atlanta, Georgia 30303-1557
(404) 525-8622

Attorney for Petitioners

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

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QUESTIONS PRESENTED FOR REVIEW

1. Was the Eleventh Circuit's reliance on the theory of comparable worth improper under the Equal Pay Act, 29 U.S.C. § 206(d), or under Title VII, 42 U.S.C. § 2000e *et seq*?

2. Can a "market force justification" be used to justify differences in pay among individuals performing substantially equal work?

3. Did the Eleventh Circuit read out of the Equal Pay Act the affirmative defense of "reasonable factor other than sex" by holding that an employer must raise an employee's salary to match that of a comparator even though the comparator's higher salary is based upon a factor other than sex?

LIST OF ALL PARTIES

The names of all parties to these proceedings appear in the caption.

CORPORATE DISCLOSURE STATEMENT

Petitioners Figgie Security, Inc., f/k/a Advance Security, Inc. and Figgie International Inc. hereby certify that the following is a full and complete list of all parent companies and subsidiaries of each corporation:

Figgie Security, Inc., f/k/a Advance Security, Inc:

As of February 18, 1994 the name of Advance Security, Inc. was formally changed to Figgie Security, Inc. in connection with the sale of Advance Security, Inc. to U.S. Security Associates, Inc.

Parent: Figgie International Inc.

No Subsidiaries

Figgie International Inc.:

Parent: None

Subsidiaries:

Alfa Costruzioni Mecchaniche Spa

Allied Industrial Distributors

A-T-O Inc.

"Automatic" Sprinkler Corporation of America

ASCOA "Automatic" Sprinkler Nederland B.V.

"Automatic" Sprinkler Belgium N.V.

Carter Controls (U.K.) Ltd.

Carter Controls Gmbh

Logan Fenamec (France) S.A.R.L.

Chemetronics Caribe, Inc.

Economy Engineering Company

Figgie Acceptance Corporation

Cannon Bumpers, Inc.

Colonial Customs, Inc.
Sooner Hotel Corporation
X.Z. Acquisition Corporation
Figgie Asia Pte. Ltd.
Figgie Canadian Holdings Ltd.
Adirondack-Sherwood Inc.
Sherwood-Drolet Corp. Ltd
Figgie Canada Inc.
Thermometer Corporation of Canada Ltd.
Figgie Communications Inc.
Figgie de Costa Rica, S.A.
Figgie do Brasil Industria e Commercio Ltda.
Figgie Foreign Sales Corporation
Figgie de Mexico, S.A. de C.V.
Figgie (G.B.) Limited
Figgie Material Handling Products (U.K.) Ltd.
Figgie Packing Systems Limited
Glidepath U.K. Limited
Fred Perry Sportswear (U.K.) Limited
W. Payne & Co. Limited (*in lig.*)
Fred Perry Sportswear GmbH
Logan Fenamec (U.K.) Limited
Figgie International de Mexico S.A. de C.V.
Figgie International (H.K.) Limited
Figgie International Real Estate Inc.
Cafig Inc.
Dusk Corporation
Ouire Corp.

Figgie Investment Trustee Limited
Figgie Leasing Corporation
Figgie Licensing Corporation
Figgie Packaging Systems Pty. Ltd.
Figgie Pension Trustee Limited
Figgie Properties Inc.
Chagrin Highlands Inc.
Cudahy Self Storage, Inc.
FGP-1 Inc.
Virginia Center Inc.
Figgie Security, Inc.
Logan/Glidepath Company
Interstate Electronics Corporation
Kohol Incorporated
Logan Glidepath Australia Pty. Ltd.
Logan-Fenamec (N.Z.) Limited
Logan Fenamec Transporttechnik GmbH
Logan Glidepath New Zealand Limited
Glidepath Australia Pty Limited (*lig*)
Glidepath Asia Pte Limited (*lig*)
Logan Transporttechnik Sweden AB
Maquiladora TCA de Juarez, S.A. de C.V.
Medcenter Management Services, Inc.
Mojonnier de Mexico S de R.L. de C.V.
Mojonnier do Brasil Industria e Commercio de Equipamentos Ltda.
Oden Corporation
Wimbledon Shirt Company Limited

Fred Perry Sportswear Limited
FP Sportswear B.V.
Fred Perry Sportswear U.K. Inc.
Rawlings Sporting Goods Company
Safway Steel Products Inc.
SP/Sheffer International Inc.
Talon-Snorkel Limited
Talon/Snorkel Pty Limited
Waite Hill Holdings Inc.
Colony Insurance Company
Cardinal Casualty Company
Hamilton Insurance Company
Waite Hill Assurance Ltd.
Waite Hill Services, Inc.

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ALL REPORTS OF OPINIONS

The Eleventh Circuit's opinion is reported at 19 F.3d 586. The district court's decision granting summary judgment is unreported, as is the Magistrate Judge's Report and Recommendation recommending that summary judgment be granted.

GROUNDS ON WHICH JURISDICTION INVOKED

The Eleventh Circuit entered judgment in this case on April 22, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

TEXT OF RELEVANT STATUTES

The Equal Pay Act (hereafter "EPA"), 29 U.S.C. § 206(d), provides as follows:

> (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of the subsection, reduce the wage rate of any employee.
>
> (2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.
>
> (3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.
>
> (4) As used in this subsection, the term "labor organization" means any organization of any kind, or any agency

or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, provides in relevant part as follows:

(a) Employer practices

It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or nationai origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

. . . .

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions.

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of

production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

42 U.S.C. § 2000e-2(a) and (h).

STATEMENT OF THE CASE

Petitioner Advance Security, Inc. (hereafter "Advance"), which was a wholly-owned subsidiary of Petitioner Figgie International Inc. (hereafter "Figgie") at the time this lawsuit was instituted, is headquartered in Atlanta, Georgia, and provides security services to customers across the country, including two government facilities. These two facilities — jointly referred to as the "Sandia National Laboratories" — are located in Tonapah, Nevada and Livermore, California.

Respondent Marilyn M. Mulhall (hereafter "Mulhall") began her employment with Advance Security in November 1978 as Manager of Services. Her starting salary was $12,996 annually. In October 1979, she was promoted to Manager of Administration. In the first two years of her employment, she received raises bringing her salary to $20,004 per year. In January 1981, Mulhall was promoted to Vice-President, Administration.

Mulhall served as Vice-President, Administration, until she resigned on May 10, 1991. During the ten years Mulhall held that position, she received merit raises on an annual basis, ranging from a low of 4.7 percent to a high of 9.5 percent. By the time Mulhall resigned, she was earning a *base salary* of $52,500 per year.

In addition, in August 1984, Mulhall was placed on the Figgie Executive Compensation Program (hereafter "the Program"). Under the Program, Mulhall was entitled to a bonus in addition to her base salary. The bonus was based on Advance's performance for the previous year. The bonuses Mulhall received ranged from $8,975 in 1987 to $12,037 in 1990.

Only three Advance employees were on the Figgie Executive Compensation Program: the Vice-President, Administration (Mulhall), the Vice-President, Controller, and the President. The compensation of other Advance employees was determined by Advance's compensation plan.

In the fall of 1990, Mulhall prepared a job description which she contends reflects her duties and responsibilities as Vice-President, Administration. Taking Mulhall's contentions as true, her duties included responsibility for the Sandia National Laboratories Government Contracts; responsibility for Advance's risk management function and workers' compensation functions; responsibility for Advance's liability and fidelity claims and involvement in litigation; purchasing responsibility and responsibility for corporate licensing; maintenance of Advance's Policy and Procedure Manual and training manual for security officers; management of Mulhall's staff; and responsibility for EEO reporting and affirmative action programs.

In September 1990, prior to her resignation, Mulhall filed a charge of discrimination with the U.S. Equal Employment Opportunity Commission. As noted above, Mulhall resigned her employment on May 10, 1991. One week later, she filed suit

against Advance and Figgie, alleging that she was paid less than eight named male comparators in violation of the Equal Pay Act, 29 U.S.C. § 206(d) (hereafter "EPA"), and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et. seq.*[1]

The male employees to whom Mulhall compares herself are:

1. Joseph Beranek, Michael Zimmerman and Richard Johnson, Project Managers. These individuals were project managers for the two Sandia facilities. Mulhall alleged that these employees reported to her. Petitioners contended, *inter alia*, that these individuals worked at different establishments than Mulhall, and thus they were not proper comparators under the Equal Pay Act.

2. William Hill, President, Investigations Corporation of America (hereafter "ICA"). ICA was an investigative subsidiary of Advance. It was undisputed that Hill was hired to start up ICA "from scratch." Petitioners contended, *inter alia*, that the skill, effort and responsibility required of Hill to start a business from scratch were not properly comparable under either the EPA or Title VII to Mulhall's administrative responsibilities for an existing and successful security business. Petitioners also contended that the extra duties required of Hill constituted a legitimate non-discriminatory reason for the pay differential under Title VII.

3. Larry V. Nelson, Vice-President, Controller. As Controller for Advance, Nelson was responsible for all of Advance's financial planning and budgeting. In addition, an accounting degree and accounting experience were prerequisites for the position of Controller. Nelson has this background and these skills, but Mulhall does not. Because of the difference in

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[1] Mulhall later amended her Complaint to assert claims for denial of promotion, intentional misrepresentation, invasion of privacy and intentional infliction of emotional distress.

required skills and in responsibilities, Petitioners contended, *inter alia*, that the jobs were not properly comparable under either the EPA or Title VII.

4. *Guido R. Massimei and John Gregg, Vice-Presidents, Operations, and Edward Trumbull, Regional Manager.* These individuals were principals of their own security businesses, and were hired by Advance in conjunction with Advance's purchase of their respective businesses. Their salaries were separately set in connection with the negotiations for the purchase of their businesses. (Significantly, Mulhall did not compare herself to *Alex Trent*, also a Vice-President, Operations; Trent, who was not the principal of an existing security business and thus was not hired in conjunction with Advance's acquisition of an existing competitive business, made *less* money than Mulhall.) Petitioners conceded a *prima facie* case for these comparators solely for purposes of their Motion for Summary Judgment, but showed that the circumstances surrounding the employment of these individuals constituted both a factor other than sex under the EPA and a legitimate, non-discriminatory reason for the pay differential under Title VII, as to which Mulhall failed to advance evidence of pretext.

On the grounds discussed above as well as others not at issue herein, Petitioners moved for summary judgment on all counts. The Magistrate Judge recommended that summary judgment be granted, and this recommendation was adopted by the Honorable J. Owen Forrester, District Court Judge, Northern District of Georgia.

The district court found that Mulhall's promotion claim was barred by her failure to exhaust administrative remedies, that Mulhall's intentional tort claims were barred for various reasons under Georgia law, and that Mulhall's salary discrimination claims lacked merit under both the Equal Pay Act and Title VII. The district court also held that the Civil Rights Act of 1991 did

not apply to Mulhall's lawsuit, because the events about which she complained arose prior to the enactment of the 1991 Act.

Mulhall appealed to the Eleventh Circuit. The Eleventh Circuit affirmed the district court's judgment in part and vacated it in part. The Eleventh Circuit agreed that Mulhall's denial of promotion claim was barred by her failure to exhaust administrative remedies, that her intentional tort claims were properly dismissed, and that the Civil Rights Act of 1991 did not apply to Mulhall's lawsuit. With respect to Mulhall's Equal Pay Act claims, the Eleventh Circuit affirmed the district court's grant of summary judgment with respect to Hill, but vacated summary judgment with respect to the seven remaining comparators. With respect to Mulhall's Title VII claims, the Eleventh Circuit affirmed the district court's grant of summary judgment with respect to Trumbull, but vacated summary judgment with respect to the seven remaining comparators.

BASIS FOR JURISDICTION BELOW

Jurisdiction was proper in the Eleventh Circuit pursuant to 28 U.S.C. § 1291, as the case was on appeal from a final decision of the United States District Court, Northern District of Georgia. Jurisdiction was proper in the district court with respect to Mulhall's claims under Title VII and the EPA pursuant to 28 U.S.C. § 1331, as these claims involved the interpretation of laws of the United States.

ARGUMENT

A. The Eleventh Circuit Improperly Relied on the Theory of Comparable Worth.

1. While comparable worth as a basis for liability has not been finally decided, most courts that have considered the theory have determined that comparable worth is an inappropriate analysis in unequal compensation cases.

"Comparable worth" has been described differently by different courts. In *County of Washington v. Gunther*, 452 U.S. 161, 166 (1981), this Court referred to comparable worth as a theory "under which plaintiffs might claim increased compensation on the basis of a comparison of the intrinsic worth or difficulty of their job with that of other jobs in the same organization or community." The Seventh Circuit has described comparable worth as "[t]he theory ... that workers should not be paid market wages, because those wages may reflect past or present discrimination, but instead a wage based on the 'objective' demands of the job." *Davidson v. Board of Governors*, 920 F.2d 441, 446 (7th Cir. 1990). The Ninth Circuit has described comparable worth as a theory that "postulates that sex-based wage discrimination exists if employees in job classifications occupied primarily by women are paid less than employees in job classifications filled primarily by men, if the jobs are of equal value to the employer, though otherwise dissimilar." *American Federation of State, County and Mun. Employees v. State of Washington*, 770 F.2d 1401, 1404 (9th Cir. 1985) (hereafter "AFSCME"). Despite the varying definitions, the theme of comparable worth is clear: that is, an analysis as to the similarities of the positions in question insofar as the skill, effort and responsibility required is no longer the primary inquiry; rather, the jobs are compared on the basis of their value to the employer, a process not contemplated by the underlying statutory scheme.

Whether the theory of "comparable worth" has any application under Title VII has never been finally decided. In *Gunther*, *supra*, this Court recognized the controversial nature of the comparable worth concept, but did not reach the question of whether it was authorized under Title VII:

> We emphasize at the outset the narrowness of the question before us in this case. *Respondents' claim is not based on the controversial concept of "comparable worth,"* under which plaintiffs might claim increased compensation on the basis of a comparison of the intrinsic worth or difficulty of their job with that of other jobs in the same organization or community.

Gunther, 452 U.S. at 166 (emphasis supplied) (footnotes omitted). In a footnote, this Court recognized that "[t]he concept of 'comparable worth' has been the subject of much scholarly debate, as to both its elements and its merits as a legal or economic principle." *Id.* at 166, n.6.

Most of the circuits to consider the issue of comparable worth have held that it has no place in current equal pay analysis, under either Title VII or the EPA. In other words, absent an allegation of intentional discrimination on the basis of sex,[2] a plaintiff must

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[2] In *Gunther*, this Court held that Title VII supported a compensation discrimination cause of action even though the jobs were not substantially similar. However, as this Court recognized, the holding in *Gunther* was a very narrow one. In *Gunther*, the plaintiffs offered evidence that the employer undertook and relied upon a comparable worth study to set employees' salaries, and that it set the pay scale for female employees, but not for male employees, at a lower level than that warranted by its own study. This disparate treatment constituted evidence of intentional discrimination against the female employees, and gave rise to a cause of action under Title VII. In the instant case, Mulhall did not allege a *Gunther* cause of action; rather, she contended that all of the individuals to whom she compared herself were performing substantially equal work.

show that the jobs being compared are substantially similar. Thus, most courts have rejected claims which depend on a comparison of the value of jobs involving *different* degrees of skill, ability and effort. *See*, *Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1134 (5th Cir. 1983) ("It is not the province of the courts, however, to value the relative worth of Plemer's and Willis' differing duties and responsibilities."); *American Nurses' Ass'n. v. State of Illinois*, 783 F.2d 716, 720 (7th Cir. 1986) ("[T]he issue of comparable worth . . . is not of the sort that judges are well equipped to resolve intelligently or that we should lightly assume has been given to us to resolve by Title VII or the Constitution."); *Christensen v. State of Iowa*, 563 F.2d 353, 356 (8th Cir. 1977) ("[A]ppellants seek a construction of Title VII that may establish a *prima facie* violation of that Act whenever employees of different sexes receive disparate compensation for work of differing skills that may, subjectively, be of equal value to the employer, but does not command an equal price in the labor market. Appellants' theory ignores economic realities."); *AFSCME*, 770 F.2d at 1407 (9th Cir. 1985) ("While the Washington legislature may have the discretion to enact a comparable worth plan if it chooses to do so, Title VII does not obligate it to eliminate an economic inequality that it did not create."); *Lemons v. City of Denver*, 620 F.2d 228, 229 (10th Cir.) ("Plaintiffs are not seeking equality of opportunity in their skills as contemplated by Title VII, . . . but instead would cross job description lines into areas of entirely different skills. This would be a whole new world for the courts, and until some better signal from Congress is received we cannot venture into it."), *cert. denied*, 449 U.S. 888 (1980). *Cf.*, *International Union v. State of Michigan*, 886 F.2d 766, 769 (6th Cir. 1989) ("Therefore, in a comparable worth case, there is a requirement of intentional discrimination or disparate treatment.").

2. The Eleventh Circuit utilized a comparable worth analysis.

Although the Eleventh Circuit avoided labelling its analysis as a comparable worth analysis, a plain reading of its opinion makes clear that it based its decision concerning certain comparators on an analysis of the intrinsic value of their jobs rather than a comparison of the skills, effort and responsibilities required. Perhaps the most dramatic example of the court's use of comparable worth is found in its Title VII analysis of William Hill's job. It is undisputed that Hill was responsible for starting a new investigative business "from scratch." This new business was to be a separate subsidiary of Advance. Mulhall, on the other hand, was responsible for a myriad of administrative and, arguably, operational duties for Advance, an existing and successful security business. The Eleventh Circuit acknowledged that these distinctions constituted a legitimate, non-discriminatory reason for the pay disparity, but found evidence of pretext based upon Mulhall's allegation that *"Hill's operations cost Advance hundreds of thousands of dollars and Mulhall's profits for the company exceeded five hundred thousand dollars per year."* Appendix at A-31 (emphasis supplied). In other words, the Eleventh Circuit relied upon factors which *it believed* should have enhanced the intrinsic value of Mulhall's position as compared to the value of Hill's position to Petitioners.

Similarly, the Eleventh Circuit used a comparable worth analysis to find that Petitioners had not proven a factor other than sex under the Equal Pay Act, and that Mulhall had presented evidence of pretext under Title VII, with respect to Massimei, Gregg and Trumbull. It is undisputed that these three individuals were hired in connection with the sales of their businesses to Advance, and that their salaries were negotiated in conjunction with those sales. Petitioners contended that this constituted a factor other than sex under the EPA, and a legitimate non-discriminatory reason for the pay differential under Title VII.

The Eleventh Circuit's opinion makes abundantly clear, however, that it rejected the Petitioners' defense based on the amount of money made by the divisions under each comparator's control. *See*, Appendix at A-24, n.23 ("Mulhall's profits exceeded Massimei's by as little as approximately $290,000 in 1986 to as much as $546,000 in 1989.... Trumbull's division *lost* money consistently") (emphasis in original); Appendix at A-33 (containing lengthy discussion of the amount of money earned by each comparator's division).

The Eleventh Circuit also relied on comparable worth to find that the positions held by Mulhall and Larry Nelson, the Vice-President, Controller, were substantially similar under both the EPA and Title VII. The job descriptions for the two positions, which were undisputed, involved entirely different job duties. Nonetheless, the court strained to find elements in common between the two jobs. The court's reliance on comparable worth is made clear by its incorrect restatement of Petitioners' position: "Defendants apparently believe that the ultimate responsibility for corporate money is greater in kind than the ultimate responsibility for administration of the business as a whole." Appendix at A-21. The issue of which responsibility is *greater* is irrelevant in an equal pay case, unless a comparable worth analysis is used. The only question is whether the responsibilities are *substantially similar*. The court's attempt to assign value to the responsibilities and effort[3] of the two positions, rather than merely determining whether the responsibilities and effort were *equal*, is clearly a comparable worth analysis, which Petitioners contend is improper under either Title VII or the EPA.

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[3] The court also noted that "we believe a jury could conclude that plaintiff's position, because of its diverse components, *took greater effort* than did the controller's relatively homogenous job tasks." Appendix at A-21 (emphasis supplied). This essentially amounts to an admission that the effort required by the two jobs was *not* substantially equal.

3. The Supreme Court should grant certiorari to determine whether a comparable worth analysis is appropriate under either Title VII or the EPA.

As previously noted, the applicability of the comparable worth doctrine has never been finally decided, although it has been the subject of much controversy over the years. Petitioners contend that a comparable worth analysis is inappropriate under both the EPA and Title VII. The impropriety of a comparable worth analysis under the EPA is made clear by the legislative history of that statute. One of the Act's sponsors remarked:

> We do not expect the Labor Department people to go into an establishment and attempt to rate jobs that are not equal. We do not want to hear the Department say, "Well, they amount to the same thing," and evaluate them so they come up to the same skill or point. We expect this to apply only to jobs that are substantially identical or equal.

109 Cong.Rec. 9197 (1963). Similarly, Petitioners believe there is no indication that Congress intended Title VII to authorize the courts to engage in a comparison of jobs to determine whether the employer has properly valued those jobs. This being the case, Petitioners urge this Court to address the issue of comparable worth in equal pay cases, an issue which has been the subject of some controversy over the years.

B. The Eleventh Circuit's Analysis of Comparators Massimei, Gregg and Trumbull Effectively Eliminates the EPA's Factor Other Than Sex Affirmative Defense.

If a plaintiff establishes a *prima facie* case under the Equal Pay Act, the defendant can avoid liability if the difference in pay is justified by one of the four exceptions set forth in the EPA: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) a differential based on any factor other than sex. *Corning Glass*

Works v. Brennan, 417 U.S. 188, 196 (1974); *Gosa v. Bryce Hospital*, 780 F.2d 917, 918 (11th Cir. 1986).

As discussed above, Massimei, Gregg and Trumbull were hired in connection with Advance's purchase of their businesses. All three of these individuals were principals of their own security businesses; when Advance purchased these three businesses, it hired Massimei, Gregg and Trumbull for salaries which were negotiated in connection with the sales of their businesses. Petitioners argued below that this additional factor involved in setting the salaries of these three individuals -- the purchase of their businesses and the client accounts accompanying those businesses — constituted a factor other than sex under the EPA.

The Eleventh Circuit rejected the factor other than sex defense proffered by Petitioners on three apparent grounds: (1) that Petitioners' defense amounted to the use of the market force justification for disparate wages; (2) that Petitioners failed to raise Mulhall's salary to match the salaries of the three comparators; and (3) that the division under Mulhall's control "outperformed" the divisions under two of her comparators' control. As is discussed in more detail *supra*, Petitioners contend that the third ground relied upon by the Eleventh Circuit amounts to a comparable worth analysis, and is an improper analysis under either the EPA or Title VII. The other two grounds relied upon by the Eleventh Circuit, however, are equally improper, as they effectively destroy the "factor other than sex" affirmative defense which was placed in the EPA by Congress.

1. The Eleventh Circuit's "market force justification" analysis is an improper interpretation of law and effectively eliminates the EPA's factor other than sex defense.

The Eleventh Circuit postulated that Petitioners' explanation for the disparity in pay suggested "that market forces demanded

paying higher wages to the men in order to sweeten the purchase deals," and noted that this position "comes precariously close to the market force justification for disparate wages long rejected as a legitimate affirmative defense." Appendix at A-24, A-24 n.22 (citing *Corning Glass Works*, 417 U.S. at 205, and *Glenn v. General Motors Corp.*, 841 F.2d 1567, 1570 (11th Cir.), *cert. denied*, 488 U.S. 948 (1988)). This holding reflects not only the Eleventh Circuit's misreading of this Court's *Corning Glass Works* decision, but also the Eleventh Circuit's willingness to read the "factor other than sex" out of the EPA entirely.

In *Corning Glass Works*, this Court rejected the employer's explanation for the difference in pay between female day shift workers and male night shift workers. It held:

> The differential arose simply because men would not work at the low rates paid women inspectors, and it reflected a job market in which Corning could pay women less than men for the same work. That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work.

Corning Glass Works, 417 U.S. at 205. *Corning Glass Works* held merely that an employer could not, under the EPA, pay women less simply because women were willing to work for less. *It did not hold that employers were precluded from offering additional compensation to individuals—male or female—who could command a higher salary in the marketplace because they possessed special skills, abilities, contacts, or anything else of value to the employer.* Indeed, such a position is absurd: for example, no one is likely to begrudge the lateral hire in a law firm a higher salary if that attorney brings with him or her a substantial number of profitable client accounts. *Yet the Eleventh Circuit's holding precludes precisely such reliance on "market factors,"*

and holds that an employer cannot distinguish between employees on the basis of the assets each individual employee brings to the bargaining table.

The Eleventh Circuit's holding in this regard is in conflict with the Eighth Circuit's holding in *Horner v. Mary Institute*, 613 F.2d 706 (8th Cir. 1980). *Horner* involved a female teacher who challenged the higher wages paid to a male counterpart. The Eighth Circuit held that the employer was justified in paying the male teacher a higher starting salary based upon the ability of the male teacher to command a higher salary elsewhere as a result of his superior skills and abilities. Relying on *Corning Glass Works*, the Eighth Circuit noted:

> Although an employer's perception that women would generally work for less than will men is not a justification for paying women less, it is our view that an employer may consider the market place value of the skills of a particular individual when determining his or her salary.

Horner, 613 F.2d at 714 (cits. omitted). The Eleventh Circuit's decision contradicts the Eighth Circuit's holding in *Horner* because the Eleventh Circuit wrongly holds that Petitioners' actions in paying Gregg, Massimei and Trumbull a higher salary than Mulhall based upon the assets each individual brought to the bargaining table constitutes an *impermissible* market force justification. The flaws in the Eleventh Circuit's rationale and conclusion are even more apparent when the salary of Alex Trent, who was a Vice-President, Operations (the same position as that held by Massimei and Gregg) but who made less money than *any* of the individuals discussed herein, *including Mulhall*, is taken into account. Trent, like Mulhall, was hired "off the street;" he was not hired in connection with the acquisition of his business, as were Massimei, Gregg and Trumbull. His salary, like Mulhall's, is lower than that commanded by the three employees who brought substantial assets in the form of competing successful businesses to the bargaining table.

In its explanation concerning the market force justification, the Eleventh Circuit relied on its own decision in *Glenn v. General Motors Corp.* In this case, the court invalidated the employer's policy of basing the salaries of certain employees on their previous salaries, holding that this policy constituted an improper reliance on the market force justification. Significantly, *the Eleventh Circuit recognized that its holding contradicted the Seventh Circuit's holding* in *Covington v. Southern Illinois Univ.*, 816 F.2d 317 (7th Cir.), *cert. denied*, 484 U.S. 848 (1987). In *Covington*, the Seventh Circuit held that the university was justified under the EPA in paying a female instructor a lower salary than a male instructor based on the male instructor's previous salary within the university system. The Eleventh Circuit rejected *Covington*, holding that "the Seventh Circuit implicitly used the market force theory to justify the pay disparity." *Glenn*, 841 F.2d at 1571.

In both *Glenn* and the present case, the Eleventh Circuit has gone beyond the scope of *Corning Glass Works*, and, in so doing, has granted the factor other than sex affirmative defense a much narrower scope than that intended by Congress and recognized by the Seventh Circuit in *Covington*. Under the Eleventh Circuit's analysis, an employer violates the EPA if it offers a higher salary to an employee who brings in new business than it provides to an employee who does not bring any business at all. This analysis is not supported by *Corning Glass Works*, nor is it supported the EPA itself. By so holding, the Eleventh Circuit has deviated from the clear intent of the EPA. Petitioners urge this Court to grant certiorari for the purpose of defining the "market force justification" utilized by the Eleventh Circuit and determining whether it can be used to narrow the scope of the factor other than sex affirmative defense.

2. By requiring Petitioners to raise Mulhall's salary to match that of her comparators, the Eleventh Circuit essentially eliminated the factor other than sex defense from the EPA.

The Eleventh Circuit further abrogated the Congressional intent surrounding the Equal Pay Act by holding that Petitioners should have raised Mulhall's salary to match the salaries of Massimei, Gregg and Trumbull:

> Assuming some truth underlies defendants' assertion [that Massimei's, Gregg's and Trumbull's higher salaries resulted from the negotiations surrounding the sale of their businesses], we are still unable to explain defendants' failure to at some point raise plaintiff's pay to match or exceed that of the comparators when her profit center outperformed Massimei's during four out of five years and Trumbull's during all three years of comparison.

Appendix at A-24 (footnote omitted). Aside from the court's reliance on comparable worth inherent in this analysis, which Petitioners contend is improper, the Eleventh Circuit has essentially, through this holding, written the "factor other than sex" affirmative defense out of the EPA.

The EPA permits pay differentials between men and women performing substantially equal jobs *if* the pay differential is based upon, *inter alia*, a "factor other than sex." *Here, the Eleventh Circuit assumed that the sale of the comparators' businesses—clearly, a factor other than sex—in fact accounted for the pay differential. Nonetheless, the court held that this factor other than sex was insufficient to establish an affirmative defense, because Petitioners should have raised Mulhall's salary to match that of the comparators after they were hired.* Thus, the factor other than sex defense, which was placed into the EPA by Congress, simply ceases to exist: once a comparator is hired at a higher starting salary, the employer has an obligation to

immediately raise the salaries of other employees doing substantially equal work to the same level, regardless of the reason for the pay differential. In other words, basing a pay differential on a factor other than sex is not good enough if the reviewing court believes the plaintiff should have earned more money.

Although the Eleventh Circuit's holding in this regard is in conflict with the basic law surrounding the EPA, this issue has never been expressly addressed by this Court, nor was it addressed by Congress. Thus, Petitioners request that this Court grant certiorari for the purpose of determining whether an employer is required to raise an employee's salary to match that of a comparator when the comparator's higher salary is based upon a factor other than sex.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant their Petition for Certiorari on the questions enumerated above.

This 19th day of July, 1994.

Respectfully submitted,

Edward Katze
(Counsel of Record)
CONSTANGY, BROOKS & SMITH
230 Peachtree Street, N.W.
Suite 2400
Atlanta, Georgia 30303-1557
(404) 525-8622

Attorney for Petitioners

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 93-8481.

Marilyn M. MULHALL,
Plaintiff-Appellant,

v.

ADVANCE SECURITY, INC.,
Figgie International, Inc.,
Defendants-Appellees.

April 22, 1994.

Female executive brought suit against former employer and its parent asserting disparate pay claims arising under the Equal Pay Act and the Civil Rights Act. The United States District Court for the Northern District of Georgia, No. 1:91-CV-1151-JOF, J. Owen Forrester, J., granted summary judgment on behalf of defendants, and plaintiff appealed. The Court of Appeals, Fay, Senior Circuit Judge, held that: (1) genuine issues of material fact existed regarding whether plaintiff and men in comparator group worked in a single establishment, and whether plaintiff and another comparator group performed substantially similar work, precluding summary judgment on Equal Pay Act claims; (2) defendants failed to establish affirmative defense as a matter of law as it related to three groups of comparators; and (3) plaintiff established prima facie case as to three groups of comparators, and responded to defendants' legitimate nondiscriminatory explanations for pay discrepancies with evidence of pretext sufficient to raise genuine factual question, precluding summary judgment on Title VII claims.

Affirmed in part; vacated in part and remanded.

1. Labor Relations key 1511.1

Female managerial employee established prima facie case under the Equal Pay Act (EPA) with regard to group of comparators consisting of three project managers working on two of employer's government contracts; although project managers worked at military sites in different locations than plaintiff, they provided the same type of service for each military facility, and they reported to plaintiff; because of centralized control and functional interrelationship between plaintiff and comparators in group, a "single establishment" existed for purposes of the EPA. Fair Labor Standards Act of 1938, § 6(d)(1), as amended, 29 U.S.C.A. § 206(d)(1).

2. Labor Relations key 1333

In Equal Pay Act cases, jobs are compared, not individual employees holding such jobs; only skills and qualifications actually needed to perform the jobs are considered, and prior experience is not relevant to the "substantially similar" inquiry; examination rests on primary, as opposed to incidental or insubstantial job duties, and while job titles are a factor for consideration, they are not dispositive. Fair Labor Standards Act of 1938, § 6(d)(1), as amended, 29 U.S.C.A. § 206(d)(1).

3. Labor Relations key 1333

Plaintiff in an Equal Pay Act case need not prove that her job and those of comparators are identical; test is one of substantiality, not entirety. Fair Labor Standards Act of 1938, § 6(d)(1), as amended, 29 U.S.C.A. § 206(d)(1)

4. Labor Relations key 1511.1

Female executive failed to establish prima facie case under the Equal Pay Act as it related to comparator; although both plaintiff and comparator were corporate department heads, and many of their job functions were identical, comparator was head of

investigations division which was created to supplement security services of corporation, and plaintiff's position as vice president, administration, did not involve investigative activities, moreover, plaintiff did not assert that she possessed any investigative skills. Fair Labor Standards Act of 1938, § 6(d)(1), as amended, 29 U.S.C.A. § 206(d)(1).

5. Labor Relations key 1511.1

Female executive established prima facie case under the Equal Pay Act with respect to comparator who held position of vice president, controller; skills needed in controller position were substantially similar to those of vice president for administration, which was plaintiff's position; moreover, responsibilities inherent in controller's and plaintiff's positions were substantially similar. Fair Labor Standards Act of 1938, § 6(d)(1), as amended, 29 U.S.C.A. § 206(d)(1).

6. Labor Relations key 1333

Affirmative defense of "red-circling" was not applicable in Equal Pay Act case in which plaintiff established prima facie case of discriminatory wage differential between herself and new employees brought into the organization to fill comparable positions, as red-circling defense refers to wages maintained for existing employees for a valid reason. Fair Labor Standards Act of 1938, § 6(d)(1), as amended, 29 U.S.C.A. § 206(d)(1).

See publication Words and Phrases for other judicial constructions and definitions.

7. Labor Relations key 1333

Fact that comparators in Equal Pay Act case were formerly owners or principals in businesses purchased by employer and that their salaries were set as part of negotiated sale of businesses did not afford employer affirmative defense based on "factor other than sex"; even assuming that market forces demanded

paying higher wages to male comparators in order to sweeten purchase deals, factor did not explain employer's failure to at some point raise female plaintiff's pay to match or exceed that of comparators when she outperformed one comparator for four out of five years and second comparator during all three years of comparison. Fair Labor Standards Act of 1938, § 6(d)(1), as amended, 29 U.S.C.A. § 206(d)(1).

8. Federal Civil Procedure key 2497.1

Female plaintiff established prima facie case of sex discrimination with respect to pay discrepancies between her salary and those of comparators, and responded to employer's legitimate nondiscriminatory explanations with evidence of pretext sufficient to raise genuine factual question, precluding summary judgment on Title VII claim. Civil Rights Act of 1964, § 703(a)(1), as amended, 42 U.S.C.A. § 2000e-2(a)(1).

Appeal from the United States District Court for the Northern District of Georgia.

Before BLACK, Circuit Judge, FAY, Senior Circuit Judge, and UNGARO-BENAGES*, District Judge.

FAY, Senior Circuit Judge:

This is a disparate pay employment discrimination suit. Plaintiff, a former employee of defendant corporations, appeals the district court's grant of summary judgment on behalf of defendants. The district court's order disposed of plaintiff's claims brought under the Equal Pay Act,[1] Title VII of the Civil Rights Act of 1964,[2] the Civil Rights Act of 1991,[3] and various state law

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* Honorable Ursula Ungaro-Benages, U.S. District Judge for the Southern District of Florida, sitting by designation.

[1] 29 U.S.C. § 206(d)(1)

[2] 42 U.S.C. § 2000e, et seq.

[3] 42 U.S.C. § 1981.

causes of action. We AFFIRM summary judgment on the claims arising under state law,[4] resting on the Civil Rights Act of 1991, and resulting from defendants' failure to promote plaintiff. We VACATE and REMAND for further consideration the disparate pay claims arising under the Equal Pay Act and the Civil Rights Act of 1964.

I. BACKGROUND

A. Facts

Plaintiff Marilyn Mulhall worked for Defendant Advance Security, Inc. ("Advance") from 1978 until her resignation in 1991. Advance is a Georgia-based company that provides security services to customers around the country. It is a wholly-owned subsidiary of Defendant Figgie International, Inc. ("Figgie").

Advance employed plaintiff as a Manager of Services in 1978, promoted her to Manager of Administration in 1979, and subsequently promoted her to Vice-President, Administration in 1981. She remained in this position until 1991, when she resigned. As Vice-President, Administration, Mulhall's responsibilities included risk management, personnel, loss prevention, salary administration, worker's compensation, purchasing, litigation, general liability insurance claims, group insurance programs for hourly personnel, hourly personnel 401(k) programs, salaried employees' payroll, equal employment opportunity, affirmative action, fidelity insurance claims, contract reviews, insurance certification programs, labor relations, applicant and employee testing programs, licensing, leases, corporate services and staff, and the Department of Defense industrial security program. On the government contracts, she had operational responsibility and

[4] Plaintiff alleged Georgia tort law causes of action of intentional misrepresentation, invasion of privacy, and intentional infliction of emotional distress. We agree with the district court that these claims are barred as a matter of law, and discuss them no further.

did short and long-term cost-forecasting. Mulhall had a clear understanding of the financial relationship between Figgie and Advance.

Plaintiff was the only female within Figgie with responsibility for a profit center in addition to her duties as a corporate staff department head. She was the only manager or vice-president responsible for a profit center who did not receive bonuses based on the profitability of the profit center. Plaintiff argues that Advance should have paid her $55,979 in bonuses between 1986 and 1990.

In 1984, Advance placed Mulhall in the Figgie Executive Compensation Program, entitling her to an executive bonus in addition to her base salary. Only three Advance employees were in the compensation program at that time: the Vice-President, Administration (Mulhall), the Vice-President, Controller (Michael Roquemore, Larry Nelson's predecessor), and the President. Bonuses arising from the operation of a profit center were apparently distinct from those springing from the Executive Compensation plan.

The success of plaintiff's suit under both the EPA and Title VII rests on the comparison of her pay and job functions with those of persons whom she designates as "comparators."[5] She names eight men whose positions are discussed here, as they were in the district court, based on logical groupings.

Group 1 consists of three project managers working on two of Advance's government contracts: Joe Beranek and his replacement, Richard Johnson from the Sandia Livermore contract (in Nevada), and Michael Zimmerman from the Sandia Tonapah contract (in California).[6]

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[5] *See, e.g., Gosa v. Bryce Hosp.*, 780 F.2d 917, 918 (11th Cir. 1986).

[6] These were government contracts for security services at military facilities.

Group 2 consists of one individual, William Hill. Hill was hired in 1988 to start up Investigations Corporation of America ("ICA"), a new division of defendant corporations.

Group 3 consists of one individual, Larry Nelson, Advance's Vice-President, Controller.

Group 4 consists of three individuals who were formerly owners or principals in businesses purchased by Advance: Guido Massimei and John Gregg, Vice-Presidents, Operations, and Edward Trumbull, Regional Manager.

Unquestionably, all eight comparators are male and all earned more money than plaintiff.[7] Where necessary, we will discuss at length the specifics of their jobs.

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[7] In 1984, when she became a vice president, Plaintiff earned $35,500 base pay. Her 1991 salary was $52,500.

We cannot discern from the record the exact disparity in plaintiff's salary and those of the Group I comparators, although defendants agree that plaintiff earned less base pay than each comparator at all relevant times. It is clear that in 1989 plaintiff earned a base salary of $47,000 while Beranek was paid $58,000. Advance increased Beranek's salary to $70,000 in 1990 while plaintiff received only a $3,000 increase, resulting in a $20,000 discrepancy between plaintiff and her subordinate.

The disparity between plaintiff's salary and that of the Group 2 comparator was approximately $26,500 in 1989 and $27,000 in 1990.

The disparity between plaintiff's salary and that of the Group 3 comparator ranged from approximately $6,500 (Mulhall's 1987 salary compared to Roquemore's 1987 salary) to $22,000 (Mulhall's 1989 salary compared to Nelson's 1989 salary).

The disparity between plaintiff's salary and those of the Group 4 comparators ranged from a low of approximately $17,000 dollars (Mulhall's 1990 salary compared to Gregg's 1990 salary) to a high of approximately $35,500 (Mulhall's 1988 salary compared to Trumbull's 1988 salary). Advance awarded each comparator in this group bonuses based on the performance of his profit center.

B. Procedure

In September 1990, prior to her resignation, Mulhall filed a charge of discrimination with the EEOC. That charge stated in full:

> I. I have worked for the company for twelve years. I have been in the position of Vice President since 1981. I am denied equal pay for the work I perform.
>
> II. I was given no satisfactory reason for the harm I experienced.
>
> III. I believe that I was discriminated against because of my sex (female) in violation of Title VII of the Civil Rights Act of 1964, as amended, and the Equal Pay Act.

The present suit was filed in May, 1991, resting exclusively on equal pay violations arising under the EPA and Title VII. Mulhall later amended her complaint to assert claims for denial of promotion and state tort law violations. The district court granted defendants' motion for summary judgment, adopting the Magistrate Judge's Report and Recommendation in full.

Specifically, the court held that as to the EPA claims: Group 1 (Beranek, Zimmerman, and Johnson) did not consist of proper comparators because the men did not work in the same establishment as plaintiff; Group 2 (Hill) and Group 3 (Nelson) were not proper comparators because their jobs did not require substantially similar skill, effort and responsibility as plaintiff's; in the case of Hill, work did not occur in the same conditions as plaintiff's; and Group 4 (Massimei, Gregg, and Trumbull) consisted of proper comparators but there was no genuine issue of material fact regarding defendants' affirmative defense that they paid the men higher salaries for a reason other than sex.

The district court also granted summary judgment in favor of defendants on plaintiff's Title VII claims because: as to Group

1 (Beranek, Zimmerman, and Johnson) and Group 4 (Massimei, Gregg, and Trumbull), although plaintiff established her prima facie case, she failed to prove that the nondiscriminatory reasons proffered by defendant for the pay disparity were pretextual; and as to Group 2 (Hill) and Group 3 (Nelson) plaintiff failed to establish a prima facie case for the same reasons discussed in the EPA claims.

Finally, the court ruled that (1) plaintiff's promotion claims brought under the EPA and Title VII were barred by her failure to file an administrative complaint alleging discriminatory denial of promotion; [8] and (2) the Civil Rights Act of 1991 did not operate retroactively.[9]

II. STANDARD OF REVIEW

We review *de novo* a district court's grant of a motion for summary judgment. *Brown v. Crawford*, 906 F.2d 667, 669

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[8] We affirm the district court's conclusion as to plaintiff's promotion claims. A plaintiff's judicial complaint is limited by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination. *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970) (Title VII complaint may encompass discrimination *like or related to* allegations contained in the EEOC charge and growing out of such allegations during the pendency of the case before the Commission.) A claim of unequal pay is not the equivalent of a claim alleging a failure to promote. Mulhall's EEOC complaint and the resulting investigation would not trigger an inquiry into defendants' promotion practices. Accordingly, plaintiff's promotion claims were correctly barred. *See also, King v. Seaboard Coast Line R. Co.*, 538 F.2d 581, 583 (4th Cir. 1976); *Johnson v. Richmond County*, 507 F.Supp. 993, 995 (S.D.Ga.), *aff'd in part*, 732 F.2d 942 (11th Cir. 1984); *King v. Georgia Power Co.*, 295 F.Supp. 943, 947 (N.D.Ga. 1968).

[9] The district court correctly ruled that the Act applies prospectively only, thereby defeating plaintiff's contention that it should apply to her claims arising prior to the statute's enactment. *See, Goldsmith v. City of Atmore*, 996 F.2d 1155, 1159 (11th Cir. 1993); *Vance v. Southern Bell Tel. & Tel. Co.*, 983 F.2d 1573 (11th Cir. 1993); *Curtis v. Metro Ambulance Serv., Inc.*, 982 F.2d 472, 473-74 (11th Cir. 1993). Plaintiff's appeal on this issue ends here.

(11th Cir. 1990), *cert. denied*, __ U.S. __, 111 S.Ct. 2056, 114 L.Ed.2d 461 (1991). On a motion for summary judgment, the court must assess the proof in order to see whether there is a genuine need for trial. *Matsushita Elec. Indus. Co. v Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). Summary judgment is appropriate only if the record shows that there is no genuine issue as to any material fact. Fed.R.Civ.P. 56(c). The substantive law identifies which facts are material, and the trial judge ruling on a summary judgment motion evaluates the evidence presented by the substantive evidentiary burden. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 254, 106 S.Ct. 2505, 2510, 2513, 91 L.Ed.2d 202 (1986). Material facts are those that might affect the outcome of the suit under the governing law. *Id.* at 248, 106 S.Ct. at 2505. All justifiable inferences about the facts must be resolved in favor of the non-movant. *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1437 (11th Cir. 1991) (en banc) (internal quotations marks and citations omitted). Finally, the court must avoid weighing conflicting evidence or making credibility determinations. *Welch v. Celotex Corp.*, 951 F.2d 1235, 1237 (11th Cir. 1992).

III. ANALYSIS

A. The Equal Pay Act Claims

Plaintiff's claims of employment discrimination are based in part on the Equal Pay Act (the "EPA"), 29 U.S.C. § 206(d), which provides:

> No employer . . . shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishments at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work in jobs the performance of which requires equal skill, effort, and responsibility and

> which are performed under similar working conditions, except where such payment is made pursuant to ... (iv) a differential based on any other factor other than sex....

Where summary judgment is granted on claims arising under the EPA, we must first review the evidentiary burdens assigned to the parties under the substantive law as dictated by the statute, and then superimpose on that framework the proper summary judgment analysis.

In *Schwartz v. Florida Bd. of Regents*, 807 F.2d 901 (11th Cir. 1987), this Court analyzed the shifting burdens in a sex discrimination case brought under the EPA. Initially, the burden rests with the plaintiff to show "that an employer pays different wages to employees of opposite sexes 'for equal work on jobs the performance of which requires equal skill, effort, and responsibility.'" *Id.* at 907 (quoting *Corning Glass Works v. Brennan*, 417 U.S. 188, 195, 94 S.Ct. 2223, 2228, 41 L.Ed.2d 1 (1974)). The statute also provides a "geographic limitation." Those employees against whom plaintiff compares herself must work in the same "establishment" as the claimant. *Brennan v. Goose Creek Consolidated Indep. Sch. Dist.*, 519 F.2d 53, 57 (5th Cir. 1975).[10] Plaintiff establishes a prima facie case by satisfying both the geographic and descriptive components of the test as applied to even one comparator. *Mitchell v. Jefferson County Bd. of Educ.*, 936 F.2d 539, 547 (11th Cir. 1991); *EEOC v. White & Son Enters.*, 881 F.2d 1006, 1009 (11th Cir. 1989).

The burden then shifts to the defendant to prove by a preponderance of the evidence that the differential in pay is justified by one of the four exceptions set forth in the statutes. *Id.* (citing *Brock v. Georgia Southwestern College*, 765 F.2d 1026, 1036 (11th Cir. 1985)). In fact, defendants must show that the factor

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[10] In *Bonner v. Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent those cases decided by the Fifth Circuit prior to October 1, 1981.

of sex provided *no basis* for the wage differential. *Id.* (emphasis added); *Gosa v. Bryce Hospital,* 780 F.2d 917, 918 (11th Cir. 1986) (the requirements for proving an exception are not met unless the factor of sex provides no part of the basis for the wage differential). Defendants' burden is a heavy one—the exceptions granted within the EPA constitute affirmative defenses. *Corning Glass Works,* 417 U.S. at 196-197, 94 S.Ct. at 2229 (1974). If proven, defendant is absolved of liability as a matter of law.

Where, as here, defendants moved for summary judgment, the court must evaluate all evidence proffered by plaintiff in the light most favorable to her case. Once she establishes a prima facie case of discrimination in pay based on sex, the success of defendants' motion rests on their ability to prove an affirmative defense. Thus, by moving for summary judgment under the EPA, defendants thrust before the court for scrutiny not only the merits of plaintiff's evidence, but the strength of their own defense and must establish that there is an absence of any issue for jury resolution.

GROUP 1 COMPARATORS

1. The Prima Facie Case

[1] The district court held that Beranek, Zimmerman and Johnson were not proper comparators because they did not work at the same establishment as plaintiff, thereby eviscerating plaintiff's prima facie case.

The term "establishment" is defined by the Secretary of Labor as "a distinct, physical place of business rather than ... an entire business or 'enterprise' which may include several separate places of business." 29 C.F.R. § 1620.9(a) (1993). Nonetheless, the former Fifth Circuit recognized in *Goose Creek* that there are situations in which a single establishment can include operations at more than one physical location. *Goose Creek,* 519 F.2d at 56. A contrary result obtained through narrow construction of the

word "establishment" could "make proof of discrimination more difficult, thus frustrating congressional intent." *Id.* at 57. *Goose Creek* set a widely followed standard recognizing that central control and administration of disparate job sites can support a finding of a single establishment for purposes of the EPA.[11] The hallmarks of this standard are centralized control of job descriptions, salary administration, and job assignments or functions. *Brownlee v. Gay and Taylor, Inc.*, 642 F.Supp. 347, 352 (D.Kan. 1986).

Defendants and the district court rested their conclusion that the project managers did not work in the same establishment as plaintiff on *Foster v. Arcata Assocs., Inc.*, 772 F.2d 1453 (9th Cir. 1985), *cert. denied*, 475 U.S. 1048, 106 S.Ct. 1267, 89 L.Ed.2d 576 (1986). We recognize the similarities between the facts in *Foster* and the present case, but find them distinguishable on the essential variables. Both cases involve contracts to provide services to, among others, armed forces facilities. Both present a plaintiff working at defendant corporation's main offices who compares herself to Project Managers working at military sites in different locations. With that, the similarities end.

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[11] *See e.g., Marshall v. Dallas Indep. Sch. Dist*, 605 F.2d 191, 193 (5th Cir. 1979) (all schools in a district under the control of a central administrative office constitute a single establishment); *American Fed'n of State, County and Municipal Employees v. County of Nassau*, 609 F.Supp. 695, 706 (E.D.N.Y. 1985) (a significant functional relationship between the work of employees in disparate locations gives rise to the finding of a single establishment under the EPA; geographic considerations are merely one factor in the analysis); *Grumbine v. United States*, 586 F.Supp. 1144, 1148 (D.D.C. 1984) (establishment is not automatically determined by geography but depends partially on degree of centralized personnel administration); *Alexander v. Univ. of Michigan-Flint*, 509 F.Supp. 627, 629 (E.D.Mich. 1980) (single establishment existed where administrative office had authority to hire, fire, and set wages).

In *Foster*, defendant corporation provided different types of services for each military facility; here, defendants provide security services for both facilities. In *Foster*, the project managers had independent decision-making authority over their staffs; here, the project managers *reported to plaintiff*. Indeed, one project manager stated that he "was in continual contact with Ms. Mulhall concerning all aspects of Advance's operations ... kept her fully briefed ... sought her approval on all significant situations ... seldom made any moves as project manager without first consulting Ms. Mulhall." Beranek Affidavit at 2-3. Furthermore, "Mulhall ... determined all cost items, wages and benefit levels." Beranek Affidavit at 2.

Also significant is Advance's response when another company offered Beranek a job in 1989. Defendant immediately increased the project manager's salary by $12,000 and added benefits sufficient to keep him employed at the Livermore facility. This response further demonstrates defendants' control over implementation of the contract and operations at the facility.

These distinctions are dispositive. A reasonable trier of fact could infer that because of centralized control and the functional interrelationship between plaintiff and the comparators in Group 1, a single establishment exists for purposes of the EPA. *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1534 (11th Cir. 1992) ("If reasonable minds could differ on the inferences arising from undisputed facts, then a court should deny summary judgment.") In keeping with this Circuit's precedent and the weight of other authority, summary judgment for defendants was improper if based solely on the establishment prong of the prima facie case.

In its discussion of the Title VII claims using Group 1 as comparators, the district court ruled (and defendants conceded) that Beranek, Zimmerman, and Johnson occupied positions requiring substantially similar skill, effort, and responsibility to

that of plaintiff. Consequently, Mulhall established a prima facie case regarding these comparators.

2. *The Affirmative Defense*

We cannot affirm summary judgment regarding the Group 1 comparators unless defendants prevailed on their affirmative defense to the EPA claim. The district court did not reach defendants' affirmative defense.[12] We reverse summary judgment as to the Group 1 comparators because nothing in the record or in the district court order suggests that defendants met their burden of persuasion on an affirmative defense under the EPA.[13]

GROUP 2 COMPARATOR

1. *The Prima Facie Case*

The district court ruled that plaintiff's job and that of Group 2 comparator William Hill did not require substantially similar skills, efforts, and responsibilities, and that Hill's and Mulhall's working conditions were dissimilar. Thus, the court found that plaintiff failed to establish a prima facie case sufficient to withstand the motion for summary judgment on the EPA claim.

[2,3] In Equal Pay Act cases, we compare the jobs, not the individual employees holding those jobs. *Miranda,* 975 F.2d at 1533. Only the "skills and qualifications actually needed to perform the jobs are considered." *Id.* Comparators' prior experience is not relevant to the "substantially similar" inquiry. *Id.* The examination also rests on primary, as opposed to incidental or insubstantial job duties. *Id.* Job titles are a factor for consid-

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[12] We note that defendants asserted "a factor other than sex" EPA defense to the Title VII claim regarding these comparators. The district court's ruling on Title VII is not dispositive because defendants bear only a burden of production there, but must prevail on an affirmative defense under the EPA by a burden of persuasion. *See infra* Pt. III.B.

[13] *See infra* Pt. III.B.

eration, but are not dispositive. *Id.* The plaintiff need not prove that her job and those of the comparators are identical; the test is one of substantiality, not entirety. *Id.* Nonetheless, in EPA cases "[t]he standard for determining whether jobs are equal in terms of skill, effort, and responsibility is high." *Waters v. Turner, Wood & Smith Ins. Agency, Inc.*, 874 F.2d 797, 799 (11th Cir. 1989). If plaintiff's evidence, with all inferences drawn in her favor, establishes an EPA violation and there is sufficient evidence such that a jury could find in her favor, then summary judgment for defendants is improper. *Id.*

[4] William Hill joined Advance in 1988 when defendants created an investigations division to supplement their security services. Hill's responsibilities included formulating the new business, obtaining clients, and creating administrative processes and marketing strategies. He also reviewed ICA's affirmative action plan, maintained employee hiring and promotion logs, administered the EEO policy, and coordinated activities with other components of Advance.

We have no doubt that investigative and administrative work are dissimilar. However, the initial question presented is whether the administrative work of starting and running a new division was substantially similar to the administrative work performed by the Vice President for Administration. Both positions are fairly described as "corporate department heads," with both plaintiff and Hill reporting to Advance's president. Many of the job functions are identical. For example, both employees had responsibilities vis-a-vis affirmative action, EEO, and coordination with other corporate entities.

Defendants place much emphasis on Hill's responsibility to acquire clients. Plaintiff argues that preparing bids for new clients and managing the resulting contracts require equal skill, effort and responsibility. She asserts that Advance's government contracts were obtained and maintained as a result of her efforts.

[Exhibit 3 to Defendant's Deposition of Marilyn Mulhall on April 30, 1991.] We cannot say as a matter of law, drawing all inferences in favor of plaintiff as nonmovant in this motion for summary judgment, that this aspect of plaintiff's and Hill's positions are not substantially similar. Nor do we find any evidence in the record to support the district court's finding that Hill and Mulhall worked in dissimilar conditions.[14]

We cannot so easily dismiss the investigative component of Hill's job. While there is no evidence before us of the time actually spent in this particular job function, investigative skills no doubt play some role in one's ability to direct investigations, making investigative knowledge more than an incidental part of Hill's position. Plaintiff does not assert that she possessed any investigative skills. Accordingly, we agree with the district court that under the strict similarity requirement imposed in EPA cases, the plaintiff failed to establish a prima facie case as it relates to the Group 2 comparator, William Hill. We affirm this aspect of the district court's ruling and go no further as to this comparator.

GROUP 3 COMPARATOR

1. The Prima Facie Case

[5] The district court determined that plaintiff failed to establish a prima facie case regarding Larry Nelson, Vice-President, Controller of Advance, because his job required different skills, effort, and responsibilities. Thus, the district court ruled that Nelson, who did not become controller until 1989, was an improper comparator for the EPA action.

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[14] Presumably, this finding rested on a conclusion that investigations take place "in the field." Even if there were evidence supporting this conclusion our opinion would not change; Mulhall worked "on site" at the Sandia Livermore facility not only for the period of contract start-up but also during supervisory visits.

Transformations in the controller position punctuated the years in question. From 1984 to 1985, both plaintiff's position and that of the controller (Nelson's predecessor) were identified as job class IV. Advance labelled both positions "vice-president." Defendants do not seem to dispute the proposition that the assignments entailed substantially similar skills, efforts, and responsibilities in the early 1980's. Neither the controller nor Mulhall were accountants. During these years the controller earned approximately $7000 more than plaintiff. In 1985, plaintiff's executive performance appraisal reflected an evaluation of 45.5 points with a recommended merit increase of 12%. Defendant Figgie reduced the increase in plaintiff's compensation to 6.7%. At the same time, the Vice-President, Controller received an evaluation of 34.2 points and obtained a merit increase of 5.9%.

In 1986, Advance upgraded the controller position to job class V and shifted many of his responsibilities to plaintiff's position by 1987. Defendants do not explain the reason for upgrading the controller's position while divesting him of numerous functions. Nor do they explain why plaintiff's job class was not raised when she was assuming responsibilities previously assigned to another vice president. We also note that defendant placed plaintiff in its executive compensation plan in 1984, when the only other participants were the president and the controller. Drawing all inferences in favor of the nonmovant, as we must, we find nothing in the record defeating plaintiff's contention that the vice presidents' positions were substantially similar from as early as 1984 until at least 1987.[15] Thus, we hold that plaintiff

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[15] The parties are not foreclosed from more precisely defining the relevant dates.

established a prima facie case regarding the pay disparity for at least that period.[16]

Advance fired Nelson's predecessor in 1988. The position was quickly upgraded to job class VI, and then upgraded without being filled to job class VII (a category matching Nelson's previous assignment) just before Nelson assumed the position. Meanwhile, plaintiff remained in job class IV until her resignation. The district court apparently focused on the controller position as it currently exists, granting summary judgment for defendants due to disparity in the skills, efforts and responsibilities entailed in filling the positions since Nelson's arrival.

The position now carries responsibility to plan, organize, direct and control defendants' accounting and financial functions, including credit collection and billing. We are not convinced that skills needed in the controller position, even as it is currently structured, are not substantially similar to those of the vice-president for administration. Advance's economic well-being is obviously the controller's main responsibility, but he also manages a staff and credit collection and billing— functions steeped in the administrative tradition. Meanwhile, monetary concerns permeate all aspects of plaintiff's position.[17]

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[16] We are not troubled that plaintiff did not specifically name Nelson's predecessor as a comparator. In Equal Pay Act cases we compare the jobs, not the individuals filling the positions. *Miranda*, 975 F.2d at 1533. Additionally, the pleadings, arguments, depositions, and exhibits address the controller position from the early 1980's to 1991. Defendants have never suggested that plaintiff may not utilize the controller position for that entire period for purposes of comparison.

[17] *See infra* Pt. I.A. for plaintiff's job description. Significantly, plaintiff handled risk management, general liability insurance claims, and acted as liaison with outside counsel on litigation. She determined Advance's position on each claim. Mulhall managed all cost, wage, and benefit programs on the government contracts, with responsibility for approximately $5,000,000 per year in those areas alone. These tasks included negotiating labor contracts for

(Footnote 17 continued on next page)

Nelson is an accountant; plaintiff is not. Defendants deny that an accounting degree is a job requirement but seemingly rely on Nelson's "understanding and belief that a degree in accounting as well as accounting experience are required for the proper performance of these duties." [Nelson Affidavit ¶5.] Although one could argue that defendants' argument raises, rather than eliminates a question of material fact, we need not reach that conclusion in order to dispose of this alleged distinguishing factor. We have previously stated that "the prima facie case is made out by comparing the jobs held . . . not by comparing the skills and qualifications of the individual employees holding those jobs." *Brock*, 765 F.2d at 1032.[18] Thus, Nelson's education and his opinion about a controller's preferred academic background are irrelevant at this juncture. Accordingly, we cannot agree with the district court that plaintiff's and Nelson's positions were distinguishable on the basis of skills.

Given our discussion of the skills involved, little analysis of the relative effort demanded to accomplish plaintiff's and Nelson's jobs is required. Both positions obviously necessitated great effort. If anything, we believe a jury could conclude that plaintiff's position, because of its diverse components, took greater effort than did the controller's relatively homogenous job tasks. Defendants failed to demonstrate that the controller exerts greater effort in his job than does plaintiff.

(Footnote 17 continued)

the Tonopah facility and forecasting long and short-term costs for both government projects. Mulhall's purchasing budget was approximately $2,000,000. Additionally, she maintained forty-eight leases and renegotiated the 1990 corporate headquarter's lease at a savings of $4.38/sq. ft. with concessions in parking, redecorating, and space. We believe a jury could find these tasks inextricably intertwined with the corporation's financial future.

[18] In *Brock*, we observed that individual employee qualifications are relevant only to defendant's affirmative defenses. *Brock*, 765 F.2d at 1033 n.9.

Moving then to the question of responsibility, we observe that both plaintiff and the controller reported directly to Advance's president, and both had ultimate responsibility as corporate heads for their divisions. Both were responsible for millions of dollars in corporate spending. Defendants apparently believe that the ultimate responsibility for corporate money is greater in kind than the ultimate responsibility for administration of the business as a whole.[19] One vice president manages money primarily and people secondarily; the other manages people and things primarily and money secondarily. We cannot agree with the district court that as a matter of law responsibilities inherent in the controller's and plaintiff's positions were not substantially similar.

A reasonable jury could certainly infer, as plaintiff suggests, that her position and that of the controller are substantially similar for purposes of the EPA. Accordingly, plaintiff met her burden of establishing a prima facie case regarding the vice president, controller.

2. *The Affirmative Defense*

We cannot affirm summary judgment regarding the Group 3 comparator unless defendants prevailed as a matter of law on their affirmative defense to the EPA claim. The district court did not reach defendants' affirmative defense.[20] We reverse sum-

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[19] Ironically, the present suit demonstrates the nexus between Mulhall's job responsibilities and those of the controller. Plaintiff's position entailed monitoring EEO and affirmative action policies and litigation. Corporate liability established via an employment discrimination suit of this nature could have a devastating financial impact on the organization. Obviously, both the controller and vice-president for administration shared concerns and expended energy to minimize defendants' potential losses arising from employment discrimination claims.

[20] We note that defendants asserted "a factor other than sex" EPA defense to the Title VII claim. The district court's ruling on Title VII is not dispositive because defendants bear only a burden of production there, but must prevail on an affirmative defense under the EPA by a burden of persuasion. *See infra* Pt. III.B.

mary judgment as to the Group 3 comparator because nothing in the record or in the district court order suggests that defendants met their burden of persuasion on an affirmative defense under the EPA.[21] Again, we note the difficulty inherent in disposing of such an issue by way of summary judgment. Credibility and the weight to be given such "explanations" are traditionally matters left to the consideration of fact finders.

GROUP 4 COMPARATORS

1. The Prima Facie Case

The district court found, and we agree, that plaintiff established a prima facie case regarding the comparators in Group 4 (Massimei and Gregg, Vice-Presidents, Operations, and Trumbull, Regional Manager). Accordingly, we move directly to review the district court's ruling that defendants proved their affirmative defense by a preponderance of the evidence.

2. The Affirmative Defense

[6] Defendants responded to the prima facie case by claiming that a factor other than sex justified the pay disparity, to wit: the comparators were formerly owners or principals in businesses purchased by Advance and their salaries were set as part of the negotiated sale of the businesses. In ruling for defendants, the district court relied on the principle of "red-circling."

The term "red circle" describes "certain unusual, higher than normal, wage rates which are maintained for many reasons." *Gosa v. Bryce Hospital,* 780 F.2d 917, 918 (11th Cir. 1986). Congress intended to include this practice as a factor other than sex that explains a wage differential and constitutes an affirmative defense. *Id.*, H.R.Rep. No. 309, 88th Cong., 1st Sess. 3 (1963), reprinted in 1963 U.S. Code Cong. & Ad.News 687-689. An example of legitimate red circling is when an employer transfers an employee from a skilled job to a less demanding position but continues to pay the transferee at the higher pay rate

[21] *See infra* Pt. III.B.

in order to have her available again when needed in the former job. U.S.Code Cong. & Ad.News at 689. Numerous courts, including ours, acknowledge red-circling where current employees are transferred to lower paying positions but retain their higher pay. *Corning Glass Works,* 417 U.S. at 210, 94 S.Ct. at 2235-36; *Gosa,* 780 F.2d at 918; *Maxwell v. Tucson,* 803 F.2d 444, 445 (9th Cir. 1986); *Grann v. Madison,* 738 F.2d 786, 790 (7th Cir.), *cert. denied,* 469 U.S. 918, 105 S.Ct. 296, 83 L.Ed.2d 231 (1984) (extending red circling to a promoted employee); *Bence v. Detroit Health Corp.,* 712 F.2d 1024, 1029-30 (6th Cir. 1983), *cert. denied,* 465 U.S. 1025, 104 S.Ct. 1282, 79 L.Ed.2d 685 (1984); *Pettway v. American Cast Iron Pipe Co.,* 494 F.2d 211, 249 n. 99 (5th Cir. 1974). When a claimant identifies a legitimately red circled employee as a comparator, the employer has an affirmative defense.

Neither the district court nor defendants direct us to any case explicitly extending the red-circling affirmative defense to a situation involving *new* employees paid higher wages than existing employees in comparable jobs. Nor has our research identified such a case. Furthermore, legislative history suggests that this extension was not considered: the congressional explanation for "red-circling" refers to wages maintained (not *created*) for a valid reason. This terminology, in combination with the examples given, convinces us that legislators did not contemplate applying the term "red-circling" to a situation like that at bar where a plaintiff makes a prima facie case of discriminatory wage differential between herself and new employees brought into the organization to fill comparable positions.

[7] With red circling removed as the justification for the wage disparity, we examine the record for evidence of another "factor other than sex" upon which defendant may properly rest its defense. The exception also applies when "the disparity results from unique characteristics of the same job; from an individual's experience, training, or ability; or from special exigent circumstances connected with the business." *Glenn v. General Motors*

Corp., 841 F.2d 1567, 1571 (11th Cir. 1988), *cert. denied*, 488 U.S. 948, 109 S.Ct. 378, 102 L.Ed.2d 367 (1988); 1963 U.S.Code Cong. & Ad.News 689.

Defendants argue that the wages were simply part of the larger negotiation picture surrounding the purchase of the comparators' businesses. Defendants seemingly suggest that market forces demanded paying higher wages to the men in order to sweeten the purchase deals.[22] Assuming some truth underlies defendants' assertion, we are still unable to explain defendants' failure to at some point raise plaintiff's pay to match or exceed that of the comparators when her profit center outperformed Massimei's during four out of five years and Trumbull's during all three years of comparison.[23] Defendants hope to ward off this analysis by labelling the argument one of "comparable worth." We need not decide the merits of the comparable worth theory here for two reasons: first, plaintiff's argument does not, by definition, depend on comparable worth; [24] second, defendants

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[22] If we read defendants' position accurately, it comes precariously close to the market force justification for disparate wages long rejected as a legitimate affirmative defense. *Corning Glass Works*, 417 U.S. at 205, 94 S.Ct. at 2233; *Glenn*, 841 F.2d at 1570.

[23] Mulhall's profits exceeded Massimei's by as little as approximately $290,000 in 1986 to as much as $546,000 in 1989, and were less than the comparator's in 1990 only because of a temporary account in Massimei's division. Trumbull's division *lost* money consistently.

[24] Comparable worth means "increased compensation on the basis of a comparison of the intrinsic worth or difficulty of their job with that of other jobs in the same organization or community." *County of Washington v. Gunther*, 452 U.S. 161, 166, 101 S.Ct. 2242, 2246, 68 L.Ed.2d 751 (1981). Some courts have held that comparable worth is not a valid consideration in pay discrimination suits. *See e.g., Davidson v. Board of Governors of State Colleges and Universities, etc.*, 920 F.2d 441, 446 (7th Cir. 1990); *American Fed'n of State, etc. v. Washington*, 770 F.2d 1401, 1408 (9th Cir. 1985); *Lemons v. Denver*, 620 F.2d 228, 229 (10th Cir.), *cert. denied*, 449 U.S. 888, 101 S.Ct. 244, 66 L.Ed.2d 114 (1980).

made employees' contributions relevant to salary increases in their response to interrogatories.[25]

We do not hold that an employer may never pay higher wages to a new employee whose position results from the purchase of his business. We simply hold that the record before us does not establish as a matter of law that comparators' superior experience, training or ability, or exigent business circumstances justified greater compensation than received by plaintiff who occupied a similar position for five years before the comparators' arrival and who consistently outperformed two of the three comparators on the very measures defendants admit constitute a basis for setting salaries. Nothing in the record establishes that the disparity in plaintiff's and the comparators' wages was attributable solely to any recognized exception to the EPA.

Because we find that plaintiff established a prima facie case as to the Group 4 comparators, and that defendant did not establish that there is no genuine issue of material fact as to its affirmative defense, we reverse the district court's grant of summary judgment on plaintiff's EPA claims to the extent they are based on Group 4 comparators.

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[25] Plaintiff's Interrogatory No. 19 asked:

> State each and every fact with particularity that Defendants considered in setting the amount of compensation to be paid to the following Advance employees at the time of hiring and each time each employee received a salary increase: Marilyn M. Mulhall, G.R. Massimei, J.R. Gregg, Ed Trumbull, William Hill, Larry V. Nelson, Michael Zimmerman, Richard F. Johnson, and Joseph Beranek.

Defendants responded in relevant part:

> In addition, general considerations with respect to determining salary increases include *recent job performance, profitability of the company, and contribution of each individual employee*. [Exhibit 1 to Plaintiff's Response to Defendant's Motion for Summary Judgment.]

Summary—Equal Pay Act Claims

We reverse the district court's grant of summary judgment for defendants as it relates to the comparators in Groups 1, 3, and 4. We find that genuine issues of material fact exist regarding whether plaintiff and the men in Group 1 worked in a single establishment, and whether plaintiff and the Group 3 comparator performed substantially similar work. We further hold that defendants failed to establish their affirmative defense as a matter of law as it relates to Groups 1, 3, and 4 comparators. We affirm the district court's grant of summary judgment to defendants regarding the Group 2 comparator, William Hill, whose job was not substantially similar to that held by plaintiff under the strict standards employed in Equal Pay Act cases.

B. The Title VII Claims

Plaintiff also alleged violations of Title VII of the Civil Rights Act of 1964. The district court granted summary judgment on the Title VII claims as to all comparators. Title VII provides in relevant part:

> It shall be unlawful employment practice for an employer—
>
> (1) to ... *discriminate against any individual with respect to his compensation,* terms, conditions or privileges of employment because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1) (emphasis added). The Act incorporates the EPA's exceptions to a pay discrepancy. 42 U.S.C. § 2000e-2(h).[26] Title VII differs from the EPA in two significant

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[26] 42 U.S.C. § 2000e-2(h) provides in relevant part:

> It shall not be an unlawful employment practice ... for any employer to differentiate on the basis of sex in determining the amount of wages or compensation paid to be paid to employees ... if such differentiation is authorized by the provisions of section 206(d) of Title 29.

respects. First, Title VII contains no "establishment" requirement, *Marcoux v. Maine,* 797 F.2d 1100, 1104 (1st Cir. 1986), and second, plaintiff must prove discriminatory intent. *Mitchell v. Jefferson County Bd. of Educ.,* 936 F.2d 539, 546 (11th Cir. 1991).

We utilize the *McDonnell Douglas Burdine* framework when analyzing the parties' burdens in gender-based wage discrimination claims. *Miranda,* 975 F.2d at 1528. *McDonnell Douglas* instructs that:

> The plaintiff first has the burden of proving a *prima facie* case of discrimination by a preponderance of the evidence. The burden then shifts to the defendant to 'articulate some legitimate nondiscriminatory reason' for the alleged discrimination. If the defendant produces such a reason, the plaintiff must then prove that the legitimate reason offered was a mere pretext for an illegal motive.

Miranda, 975 F.2d at 1528, *citing McDonnell Douglas v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817,1824, 36 L.Ed.2d 668 (1973). The burden of proof remains at all times with the plaintiff. *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 253,101 S.Ct. 1089, 1093-94, 67 L.Ed.2d 207 (1981).

The absence of an establishment requirement permits the plaintiff to make a Title VII prima facie case on a showing that she is female and her job was substantially similar to higher paying jobs occupied by males. *Miranda,* 975 F.2d at 1529. Clearly, if plaintiff makes a *prima facie* case under the EPA, she simultaneously establishes facts necessary to go forward on a Title VII claim. *EEOC v. White & Sons Enterps.,* 881 F.2d 1006, 1008, 1010 (11th Cir. 1989). The standard for "similarity" in Title VII cases is relaxed, *Miranda,* 975 F.2d at 1526, and defendant's burden in rebutting the *prima facie* case is "exceedingly light." *Perryman v. Johnson Products, Co.,* 698 F.2d 1138, 1142 (11th Cir. 1983). If defendant meets his burden of produc-

tion, the presumption raised by the prima facie case is rebutted and "drops from the case." *Burdine,* 450 U.S. at 256 n. 10, 101 S.Ct. at 1095 n. 10.

Plaintiff must then demonstrate that the employer's "legitimate" reason was in fact, pretextual. Courts have long recognized that an employer's true motivations are especially difficult to establish, making such factual determinations "generally unsuitable for disposition at the summary judgment stage." *Hairston v. Gainesville Sun Pub. Co.,* 9 F.3d 913, 919 (11th Cir. 1993); *United States Postal Service Bd. of Governors v. Aikens,* 460 U.S. 711, 716, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983). At summary judgment, plaintiff's burden is simply to raise a genuine factual question as to the existence of pretext. "The plaintiff is not required to introduce evidence beyond that already offered to establish the prima facie case." *Hairston,* 9 F.3d at 921; *Burdine,* 450 U.S. at 256 n. 10, 101 S.Ct. at 1095 n. 10 ("Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation.") Summary judgment is appropriate when evidence of discriminatory intent is totally lacking. *Id.* This will seldom be the case when the "elusive factual question" of intentional discrimination is involved. *Id.*

GROUP I COMPARATORS

1. The Prima Facie Case

Defendants concede that plaintiff can make out a *prima facie* case of discrimination in pay as compared to Beranek, Zimmerman, and Johnson.

2. The Legitimate, Non-discriminatory Reason

The district court accepted defendants' argument that the disparity was attributable to a factor other than sex; defendants allegedly paid these men more money than plaintiff for substan-

tially similar work because their salaries were set by the government as part of contracts with Advance. We agree that defendants met their "exceedingly light" burden of production on this issue.

3. Pretext

[8] Granting summary judgment, the district court ruled that plaintiff failed to present any evidence of pretext. We disagree. While defendants argued that Advance did not set the comparators' salaries, evidence supports Mulhall's contention that Advance did set their salaries acting through plaintiff as the vice-president for administration responsible for preparing bids and winning contracts. Fulfilling her responsibilities placed Mulhall in the unenviable position of creating a competitive bid that included salaries for her subordinates that were higher than her own. The government only "set the salaries" to the extent that it selected the most favorable bid taking all factors into account. Further evidence of Advance's role in setting the project managers' salaries is found in their response to another job offer received by Beranek in 1990. Advance's president immediately raised Beranek's salary $12,000 for a total of $70,000 (approximately $20,000 more than plaintiff's base pay). Whereas the government reimbursed Advance for Beranek's original $58,000 in this cost-plus account, Advance unhesitatingly assumed responsibility for the additional $12,000.

Defendants rely on a Seventh Circuit case for the proposition that the mere fact that a supervisor is paid less than her subordinates does not indicate an unlawful wage disparity. *Riordan v. Kempiners,* 831 F.2d 690, 698 (7th Cir. 1987). That case is distinguishable because the plaintiff there was a civil service worker who compared her pay to those of private sector salesmen. Here, all employees work in the private sector, renowned for flexibility in wage setting. While we certainly do not go so far as to hold that an unlawful wage disparity exists whenever a supervisor is paid less than her subordinates, we have no diffi-

culty agreeing that plaintiff can survive summary judgment by pointing to the true nature of Advance's relationship with the comparators as proof of defendants' intentional discrimination. Accordingly, we reverse summary judgment on plaintiff's Title VII claims as they relate to Group 1 comparators.

GROUP 2 COMPARATOR

1. The Prima Facie Case

The district court found that plaintiff failed to make a prima facie case as to comparator William Hill, the president of ICA, because her position and his were not substantially similar. In Part III.A., *supra,* we agreed that plaintiff failed to meet the EPA's strict standard on this issue. Here, however, we review the evidence under Title VII's relaxed requirement. Because the record is devoid of evidence regarding the amount of time and effort Hill actually expended on investigative supervision, and the extent to which that supervision entailed personal investigative experience rather than generalized supervisory skills, we believe plaintiff raised a genuine issue of material fact regarding the similarity of the positions for the purposes of a Title VII suit.

2. The Legitimate Non-discriminatory Reason

Defendants assert, and the district court agreed, that the pay discrepancy is explainable because Advance hired Hill to start up a new business and he had different skills. Agreeing that defendants met their burden of production, we move forward.

3. Pretext

We have already held that the alleged difference between starting up a new business and creating business by preparing and retaining contracts is not a factor other than sex that totally explains Hill's higher salary. Plaintiff argues that defendants' explanation is pretextual—that it fails to explain the $26,000 to $27,000 discrepancy in their base pay at a time when Hill's

operations cost Advance hundreds of thousands of dollars and Mulhall's profit for the company exceeded five hundred thousand dollars per year. In light of defendants admitted practice of assigning salaries based upon consideration of the employee's contributions to the company, the striking gap in Hill's and Mulhall's earnings on behalf of the company, and the significant difference in their salaries, we believe plaintiff has established pretext sufficiently to survive a motion for summary judgment.

GROUP 3 COMPARATOR

1. The Prima Facie Case

Because we have already determined that plaintiff made out a prima facie case on her Equal Pay Act claims as they relate to Larry Nelson, we also hold that she did so for the purposes of Title VII.

2. The Legitimate Non-discriminatory Reason

Defendants argued to the district court that Nelson's ten year seniority constitutes a legitimate non-discriminatory explanation for the difference in Mulhall's and Nelson's pay. Neither defendants nor the court relied on the "seniority system" defense to the EPA because that defense requires a formal seniority structure. *Morgado v. Birmingham-Jefferson County Civil Defense Corps.*, 706 F.2d 1184, 1189-90 (11th Cir. 1983), *cert. denied*, 464 U.S. 1045, 104 S.Ct. 715, 79 L.Ed.2d 178 (1984). Instead, the district court's ruling on behalf of defendants rested on "a factor other than sex," to wit, seniority. *See e.g., Blocker v. AT & T Technology Systems*, 666 F.Supp. 209, 213-214 (M.D.Fla. 1987) (citing cases). Applying the factor other than sex defense broadly, we agree that defendants adequately raised a legitimate non-discriminatory reason for the pay disparity on a motion for summary judgment.

3. Pretext

While seniority explains some of the disparity in pay between Mulhall and Nelson, it does not explain the disparity in pay attributable to Advance's reclassifying the controller position from level IV to level VII when many of the controller's functions were assigned to plaintiff. Also troubling is defendants' contention that had plaintiff remained with Advance, and had she continued to receive regular pay increases similar to those she received during her employment, "her salary would likely have surpassed Nelson's salary." [Defendant's Motion for Summary Judgment at 34 n. 58.] At most, this raises a genuine issue of material fact requiring trial. Furthermore, we have previously rejected a similar rationalization for disparate pay. In *EEOC v. Reichhold Chems., Inc.*, 988 F.2d 1564,1571 n. 5 (11th Cir. 1993) we stated, "[a] defendant cannot argue that it should escape liability [under Title VII] because it is steadily decreasing a sex-based disparity. The statute contemplates that discriminatory behavior will immediately be corrected."

We reverse summary judgment for defendants on the Title VII claims as they relate to the controller position because plaintiff's evidence supports her allegation that defendants' explanation is merely pretextual.

GROUP 4 COMPARATORS

1. The Prima Facie Case

The district court held, and we agree, that plaintiff established a prima facie case as it relates to the Group 4 comparators.

2. The Legitimate, Non-discriminatory Reason

We have already decided that defendants failed to establish as a matter of law that the comparators were paid more solely because their salaries were negotiated as a part of the sale of their

business to defendants.[27] Their argument was sufficient, however, to meet the lighter burden of production required under the Title VII standard.

3. Pretext

Plaintiff searched for evidence in support of pretext through comparison of her profit making record with those of the comparators. The tremendous disparity between her salary and those of the comparators, when contrasted with her high earnings on behalf of Advance and the lesser contributions of comparators Trumbull and Massimei suggests that something was awry. However, Trumbull's contractual salary was fixed at $80,000 as part of the purchase price of his company. When his contract term ended in 1992 his salary dropped to $46,000—an amount below Mulhall's 1991 salary. Advance clearly adjusted Trumbull's salary downward in keeping with his performance as soon as contractually free to do so. This negates Plaintiff's claim of pretext as to this comparator.

Similarly, Mulhall outperformed Massamei during two of the three years under comparison and his third year earnings exceeded Mulhall's only because of a large temporary account. However, in contrast with Trumbull's precipitous reduction in salary when his contract ended, Massamei's career with Advance culminated in his promotion to President in 1991. Meanwhile, Plaintiff's salary was never adjusted to reflect her superior earnings on behalf of the company.

As to comparator Gregg, we note that his earnings exceeded plaintiff's by between $102,900 and $146,635 for four of the five years under comparison, but that plaintiff outperformed Gregg by $102,900 during the remaining year. Gregg earned approximately $20,000 more than Plaintiff each year. He resigned prior to the 1990 salary review, but up to that time

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[27] *See supra* Pt. III.A.

Plaintiff's salary was never adjusted to minimize the discrepancy in their compensation in spite of her performance.

Further supporting pretext as to comparators Massamei and Gregg is the fact that both were awarded bonuses as vice presidents of profit centers, while Mulhall was never so compensated despite her earning record on the government contract profit centers. For purposes of summary judgment, we find that Plaintiff produced evidence of pretext as it relates to comparators Massamei and Gregg, but not to comparator Trumbull.

Summary—Title VII Claims

We reverse the district court's grant of summary judgment on the Title VII claims as they relate to the comparators in Groups 1, 2, and 3, and as to Group 4 comparators Massamei and Gregg because plaintiff established a prima facie case as to these comparators and responded to defendants' legitimate non-discriminatory explanations for the pay discrepancies with evidence of pretext sufficient to raise a genuine factual question appropriate for consideration by a jury. We affirm the district court's grant of summary judgment as to Group 4 comparator Trumbull.

IV. CONCLUSION

For all of the foregoing reasons, we AFFIRM summary judgment for defendants on the state tort claims, the promotion claim, and the claims arising under the Civil Rights Act of 1991. We VACATE summary judgment for defendants and REMAND for further consideration those claims arising under the Equal Pay Act and the Title VII of the Civil Rights Act of 1964.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO. 1:91-CV-1151-JOF

MARILYN M. MULHALL,
Plaintiff,

vs.

ADVANCE SECURITY, INC., and
FIGGIE INTERNATIONAL, INC.,
Defendants.

ORDER

[Filed: March 17, 1993]

This matter is before the court on Magistrate Judge Dougherty's Report and Recommendation that Defendants Advance Security, Inc., and Figgie International, Inc.'s motion for summary judgment be granted. Plaintiff Marilyn M. Mulhall has filed objections. This court has thoroughly examined Plaintiff's arguments against and Defendants' responses to the report and recommendation. After review, this court finds Plaintiff's objections insupportable under the Equal Pay Act, Title VII, or state tort law. No objections have been filed regarding the denial of sanctions. This court, therefore, ADOPTS the report and recommendation as the opinion and order of the court and GRANTS Defendants' motion for summary judgment. [70-1, 71-1, 52-1, 53-1, 59-1].

SO ORDERED this 16th day of March, 1993.

/s/ J. Owen Forrester
J. OWEN FORRESTER
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION 1:91-cv-1151-J0F

MARILYN M. MULHALL

vs.

ADVANCE SECURITY, INC., and
FIGGIE INTERNATIONAL, INC.

JUDGMENT

[Filed: March 17, 1993]

This action having come before the court, Hon. J. Owen Forrester, United States District Judge, for consideration of the Magistrate Judge's report and recommendation (that defendants' motion for summary judgment be granted), and the court having adopted the report and recommendation as the order of the court, it is

Ordered and Adjudged that the plaintiff recover nothing in this action, that her complaint be, and the same hereby is, **dismissed,** and that the defendants recover of the plaintiff their costs of action.

Dated at Atlanta, Georgia, this 17th day of March, 1993.

LUTHER D. THOMAS, CLERK

By: /s/ Denza F. Bankhead
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

1:91-cv-1151-JOF

MARILYN M. MULHALL

v.

ADVANCE SECURITY, INC., and
FIGGIE INTERNATIONAL, INC.

ORDER FOR SERVICE OF REPORT AND RECOMMENDATION

Attached is the report and recommendation of the United States Magistrate made in this action in accordance with 28 U.S.C. § 636(b)(1) and this Court's Local Rules 260 and 500. Let the same be filed and a copy, together with a copy of this Order, be served upon counsel for the parties.

Pursuant to 28 U.S.C. § 636(b)(1), each party may file written objections, if any, to the report and recommendation within ten (10) days of the receipt of this Order. Should objections be filed, they shall specify with particularity the alleged error or errors made (including reference by page number to the transcript if applicable) and shall be served upon the opposing party. The party filing objections will be responsible for obtaining and filing the transcript of any evidentiary hearing for review by the district court. If no objections are filed, the report and recommendation may be adopted as the opinion and order of the district court and any appellate review of factual findings will be limited to a plain error review. *United States v. Slay*, 714 F.2d 1093 (11th Cir. 1983), *cert. denied* 424 U.S. 1050 (1984).

The Clerk is directed to submit the report and recommendation with objections, if any, to the district court after expiration of the above time period.

SO ORDERED, this 9th day of November, 1992.

/s/ John E. Dougherty
JOHN E. DOUGHERTY
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION
NO. 1:91-cv-1151-JOF

MARILYN M. MULHALL,
Plaintiff,

v.

ADVANCE SECURITY, INC., and
FIGGIE INTERNATIONAL, INC.,
Defendants.

MAGISTRATE'S ORDER AND REPORT AND RECOMMENDATION

THIS ORDER AND REPORT AND RECOMMENDATION IS UNDER THE SEAL OF THE COURT. UNTIL OTHERWISE ORDERED BY THE COURT, IT IS NOT TO BE DISSEMINATED AND MAY BE VIEWED ONLY BY THE PLAINTIFF, PLAINTIFF'S COUNSEL, DEFENDANTS' COUNSEL, DESIGNATED REPRESENTATIVES OF THE DEFENDANTS, AND COURT EMPLOYEES. NO PERSON, FIRM, CORPORATION, OR OTHER ENTITY SHALL USE ANY OF THE INFORMATION CONTAINED HEREIN IN ANY MANNER INCONSISTENT WITH THE LITIGATION OF THE ABOVE-STYLED CASE. FURTHERMORE, NO PERSON, FIRM, CORPORATION, OR OTHER ENTITY SHALL GIVE, SHOW, DISCLOSE, MAKE AVAILABLE, OR COMMUNICATE THE INFORMATION CONTAINED HEREIN TO ANY OTHER PERSON, FIRM, CORPORATION, OR OTHER ENTITY.

Presently before the court in the above-styled case are the defendants' Motion for Summary Judgment, Docket Entry [59-

1], plaintiff's Motion to Amend, Docket Entry [53-1], and an Order to Show Cause, Docket Entry [52-1]. For the reasons stated herein, the undersigned magistrate judge RECOMMENDS that the defendants' Motion for Summary Judgment be GRANTED. IT IS FURTHER ORDERED that plaintiff's Motion to Amend be DENIED. Finally, IT IS RECOMMENDED that costs not be levied against plaintiff.

I. Statement of Facts

(1) Plaintiff was hired by defendant Advance Security in November, 1978. (Plaintiff's 6/9/92 Dep. at 8).

(2) Plaintiff advanced through the ranks until she was promoted to Vice-President, Administration.

(3) Don Bottom was hired as President of Advance Security in December, 1978. (Plaintiff's 6/9/92 Dep. at 8).

(4) Beginning in mid-1979 and continuing until October, 1989, plaintiff engaged in an "on-again, off-again" sexual relationship with Mr. Bottom.

(5) In December, 1989, Steve Van Cleve replaced Don Bottom as President of Advance Security. (Plaintiff's 8/30/92 Dep. at 31, 36).

(6) Guido R. Massimei replaced Steve Van Cleve as President in December, 1990. (Dep. of G. R. Massimei at 24).

(7) Plaintiff filed a charge of discrimination with the EEOC on September 14, 1990.

Other necessary material facts will be developed later in this Order and Report and Recommendation as necessary.

II. Defendants' Motion for Summary Judgment Should be Granted

A. Plaintiff's Title VII Promotion Claims are Barred

The complaint in this case seeks to state a cause of action for failure to promote. *See, Complaint*, Docket Entry [9-1] at ¶¶ 15 and 27. Title VII prohibits discrimination in promotion decisions. *See, Wall v. Trust Company of Georgia*, 946 F.2d 805, 809 (11th Cir. 1991); *Perryman v. Johnson Products*, 698 F.2d 1138, 1142 n.7 (11th Cir. 1983); 42 U.S.C. § 2000e-2.

The filing of a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to bringing suit in federal court. *Zipes v. Trans World Airlines*, 455 U.S. 385 (1982). However, it is a condition precedent. *Thomas v. Florida Power & Light Co.*, 764 F.2d 768 (11th Cir. 1985). Plaintiff filed a charge of discrimination on September 14, 1990. (D.E. 4 to Deposition, hereinafter Dep. of Marilyn Mulhall, Vol. 1). The charge filed with the EEOC states:

> I. I have worked for the company for 12 years. I have been in the position of Vice President since 1981. I am denied equal pay for the work I perform.
>
> II. I was given no satisfactory reason for the harm I experienced.
>
> III. I believe that I was discriminated against because of my sex (female) in violation of Title VII of the Civil Rights Act of 1964, as amended, and the Equal Pay Act.

(*Id.*).

"The judicial complaint is limited to the scope of the administrative investigation which could reasonably be expected to grow out of the charge of discrimination." *Griffin v. Carlin*, 755 F.2d 1516, 1522 (11th Cir. 1985) (citing cases). In *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970), the former

Fifth Circuit set forth what has been called the "like or related" or "reasonable expectation" test. *See, Evans v. U.S. Pipe & Foundry Co.*, 696 F.2d 925, 928 (11th Cir. 1983). This test "defines the . . . degree to which the discrimination alleged in a Title VII plaintiff's complaint can vary from that charged in the EEOC complaint and that investigated by the commission." *Evans*, 696 F.2d at 928. According to *Evans*, the administrative charge and the investigation comprise a starting point for determining the scope of the judicial complaint.

After reviewing the administrative charge filed in this case, it would be unreasonable to conclude that the EEOC or the defendant (named as a respondent in the EEOC charge), had notice that plaintiff was claiming discrimination other than unequal pay. Furthermore, it appears that the EEOC investigation was limited to the compensation claim. *See*, Affidavit of Mary E. Frey, D.E. 4 to Defendants' Reply to Plaintiff's Response to Defendants' Motion for Summary Judgment, Docket Entry [64-1]. In short, plaintiff has failed to file an administrative complaint alleging a discriminatory denial of promotion. Defendants are, therefore, entitled to summary judgment on plaintiff's Title VII promotion claim.

B. Plaintiff's Equal Pay Claims

Plaintiff has averred that she was discriminated against because "in the terms of her salary and compensation, including bonuses and other emoluments of her office, she was paid substantially less than [eight male comparators], which included a lower base salary, denial of certain incentive bonuses available to Advance's male employees and lower bonuses under the Figgie Executive Compensation Program resulting from her lower base salary." (Amended Complaint, Docket Entry [9-1] at ¶ 14). Plaintiff contends that this pay disparity was based upon her sex, and violates the Equal Pay Act (EPA), 29 U.S.C. § 206(d)(1).

1. Actions Under the EPA

As will become evident, the respective burdens of a plaintiff and defendant differ according to the statutory scheme under which an equal pay claim is asserted. Under the EPA, a plaintiff must first establish a *prima facie* case of a pay disparity by showing "that an employer pays different wages to employees of opposite sexes 'for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions'." *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974), quoting 29 U.S.C. § 206(d)(1); *Mitchell v. Jefferson County Board of Education*, 936 F.2d 539, 547 (11th Cir. 1991); *EEOC v. White & Son Enterprises*, 881 F.2d 1006, 1009 (11th Cir. 1989). Once a plaintiff establishes a *prima facie* case, *the defendant has the burden of showing* that the pay differential is justified under one of four exceptions contained in the Act. *Corning Glass*, 417 U.S. at 196; *Mitchell*, 936 F.2d at 547; *Glenn v. General Motors Corp.*, 841 F.2d 1567, 1569 (11th Cir.), *cert. denied*, 488 U.S. 948 (1988).

The EPA also contains a geographical limitation:

> No employer, having employees subject to any provisions of this section shall discriminate, *within any establishment in which such employees are employed*, between employees on the basis of sex by paying wages to employees *in such establishment* at a rate less than the rate at which he pays wages to employees of the opposite sex *in such establishment* for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. . . .

29 U.S.C. § 206(d)(1) (emphasis added).

In *A. H. Phillips, Inc. v. Walling*, 324 U.S. 490 (1945), the Court was asked to determine whether employees working in a warehouse owned by an "interstate grocery chain store system" were exempted from the Fair Labor Standards Act of 1938 by virtue of 29 U.S.C. § 213(a)(2) which applies to certain retail and service establishments. The Court stated its belief that "establishment" meant "a distinct physical place of business." 324 U.S. at 496. This belief was confirmed in *Mitchell v. Bekins Van & Storage Co.*, 352 U.S. 1027 (1957) (per curiam) in which the Court held that "Respondent's five physically separate warehouses do not constitute a single 'retail establishment' within the meaning of the exemption provided by § 13(a)(2) of the Fair Labor Standards Act." *Id.*

Although the continuing validity of *A. H. Phillips, Inc.* and *Bekins Van & Storage Co.* has been questioned, *see, e.g., Brownlee v. Gay & Taylor, Inc.*, 642 F. Supp. 347 (D. Kan. 1985), *aff'd*, 861 F.2d 1222 (10th Cir. 1988), other courts of appeals have rejected extending the term "establishment" to encompass "separate offices of an employer that are geographically and operationally distinct." *Foster v. Arcata Assoc., Inc.*, 772 F.2d 1453 (9th Cir. 1985), *cert. denied*, 475 U.S. 1048 (1986) (citing cases).

a. Beranek, Zimmerman and Johnson are Not Proper Comparators

Based upon the foregoing, Joe Beranek, Michael Zimmerman, and Richard Johnson are not proper comparators. These three individuals are project managers at the Sandia National Laboratories in Tonapah, Nevada and Livermore, California. Beranek worked at the Livermore facility and was replaced by Johnson; Zimmerman currently works at the Tonapah facility. Plaintiff, by contrast, worked in defendants' Atlanta, Georgia "establishment." The project managers reported to plaintiff. (D.E. 3 to Plaintiff's Deposition). Both of the Sandia facilities are operated as "cost-plus account[s] where Sandia reimburses Advance for

all of [its] costs. For providing the service, [Advance] receive[s] a management fee." (Plaintiff's Dep. at 77). The two Sandia locations are operated under two separate contracts. (D.E. 3 to Plaintiff's Deposition). These contracts set the project managers' wages. Thus, this is not a case in which a central authority was responsible for employment and wages and would transfer employees from one location to another. *Brennan v. Goose Creek Consolidated & Independent School Dist.*, 519 F.2d 53, 58 (5th Cir. 1975).

b. Hill is Not a Proper Comparator

Plaintiff also seeks to compare herself to William Hill. Mr. Hill was hired in December, 1988 to start up a new division of defendants, Investigations Corporation of America (ICA). (Plaintiff's Dep. at 91-93). He had formerly been employed as a Vice-President of Investigations for Wackenhut Corporation. (*Id.*). ICA differed from defendants' other operations in that the former was an investigations business whereas defendants had, until then, been in the security contract business. (*Id.*).

Based upon these facts, William Hill is not a proper comparator. As noted above, to make out a *prima facie* case, plaintiff must show that she performed equal work on a job which required equal skill, effort, and responsibility; and that the two jobs were performed under similar working conditions. Plaintiff has failed to make out a *prima facie* case as regards William Hill. Although "[t]he jobs held by employees of opposite sexes need not be identical, rather they must only be 'substantially equal'," *Brock v. Georgia Southwestern College*, 765 F.2d 1026, 1032 (11th Cir. 1985), "[t]he standard for determining whether jobs are equal in terms of skill, effort, and responsibility is high." *Waters v. Turner Wood & Smith Ins. Agency, Inc.*, 874 F.2d 797, 799 (11th Cir. 1989).

In this case, there are significant differences between plaintiff's job and that performed by William Hill. Plaintiff's job was in

administration, and she performed administrative tasks. Specifically, plaintiff reviewed and revised the handbook used by defendants' security officers. She ran the Salary Administration Programs, the Benefits Program for Salaried Personnel, and created the Employee Incentive and Award Programs used by defendant. Plaintiff acts as a liaison between defendant and outside counsel for litigation claims, and she has responsibility for general liability and fidelity claims. She monitored employee screening programs, and was responsible for EEO, Affirmative Action, Worker's Comp., hourly insurance, and risk management programs. Plaintiff managed corporate services personnel. She performed purchasing and corporate licensing functions and managed defendants' leases. Plaintiff's job also entailed some technical writing. Finally, plaintiff was responsible for some marketing, and she managed the Sandia National Laboratories' accounts. This latter job also required plaintiff to prepare and present bids to the client. (D.E. 3 to Plaintiff's Dep.).

Although essential to defendants' operations, plaintiff's job is not comparable to William Hill's. The latter was an investigator who was hired to create an investigations division of defendant. Investigations require different skills and efforts, and are not performed under similar working conditions than providing administrative management for security services. Furthermore, the skill, effort, responsibility and working conditions involved in creating a new line of business differ from that required to manage an existing business service and retain the current client base.

c. Larry Nelson is Not a Proper Comparator

Plaintiff compares herself to Larry Nelson, defendants' Vice-President, Controller. However, Mr. Nelson is not a proper comparator because his job and plaintiff's job do not entail substantially equal skill, effort, and responsibility.

Mr. Nelson's major job responsibility was to plan, organize, direct and control defendants' Accounting and Control function. This entailed reporting operations results and providing chronological systems. (Affidavit of Larry Nelson, Exhibit 3 to Defendants' Motion for Summary Judgment at ¶¶ 3-4). Mr. Nelson's job may be summarized as the defendants' chief accounting/finance position. While, as plaintiff points out, plaintiff was required to have some knowledge of how to manage costs as well as "a clear understanding of the manner in which defendant Figgie allocated millions of dollars to defendant Advance," (Plaintiff's Response to Defendants' Motion for Summary Judgment at 18), Mr. Nelson had responsibility for *all* of defendant Advance's financial and accounting functions. Mr. Nelson coordinated and directed these functions. (Nelson Affidavit at ¶¶ 3 and 4(a)). Plaintiff merely monitored certain financial functions as they related to areas under her supervision. (Plaintiff's Response to Defendants' Motion for Summary Judgment at 18). Mr. Nelson was responsible for the financial function of *all* of defendant Advance's various units. Finally, Mr. Nelson was responsible for credit collection, billing, and forecasting short and long-range objectives and requirements.

In short, the plaintiff's position and Mr. Nelson's position did not require equal skill, effort, and responsibility. Plaintiff's position was an administrative one while Mr. Nelson's position was an accounting/financial one. While plaintiff may have been required to have some knowledge of financial matters, this knowledge did not rise to the same level, scope, or responsibility as was required to perform the position of Vice-President, Controller. Plaintiff has failed to make out a *prima facie* case with respect to Mr. Nelson's job.

d. Massimei, Gregg, and Trumbull Are Not Proper Comparators

Plaintiff compares her position to the position of Vice-President, Operations, held by Guido "Rick" Massimei and John

Gregg, and the position of Regional Manager, held by Edward Trumbull. For purposes of their Motion for Summary Judgment only, the defendants concede that plaintiff has established a *prima facie* case under the EPA with respect to these three men. Defendants argue, however, that they are entitled to summary judgment because Massimei, Gregg, and Trumbull were paid more by virtue of a reasonable factor other than sex. Plaintiff contends, by contrast, that defendants have merely created a genuine issue of fact as to whether defendants have successfully met their burden of proving an affirmative defense.

Plaintiff argues that because defendants must prove by a preponderance of the evidence that sex played no part in the pay disparity between herself and Messrs. Massimei, Gregg and Trumbull, defendants' explanation merely creates a material issue of fact.

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). Once a motion for summary judgment has been properly made, the nonmoving party must go beyond the pleadings, and through affidavits, depositions, answers to interrogatories, and admissions on file, designate specific facts which show that there is an issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); Fed.R.Civ.P. 56(e). The materiality of a question of fact will be determined by substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

While it is true that in the usual case, the party moving for summary judgment does so based upon an issue which the nonmoving party will have the burden of proving at trial, *see, e.g., Celotex, supra,* a party may also move for summary judgment on an issue on which he will have the burden of proof at trial. For

example, the rule itself contemplates a grant of summary judgment as to liability even if there is a genuine issue as to damages. This may result when a defendant admits liability. On the other hand, defendants have been granted summary judgment based upon their assertions of affirmative defenses — issues the defendants would have had the burden of proving at trial — when the plaintiff has failed to raise a material question of fact sufficient to negate such a defense. *See, Rommell v. Automobile Racing Club of America*, 964 F.2d 1090 (11th Cir. 1992).[1]

In the instant case, the defendants contend that Messrs. Massimei, Gregg and Trumbull owned or were principals in security companies purchased by defendant Advance. The salaries of these three men were part of the consideration they received for the negotiated sale of their businesses to the defendant. *See*, Plaintiff's Dep. at 325-30, 333-36; D.E. 27, 31 and 32 to Plaintiff's Dep. This constitutes a pay differential based on a factor other than sex. Plaintiff has not presented facts which question this "affirmative defense." Accordingly, defendants have established the pay differential between plaintiff and Massimei, Gregg and Trumbull did not occur because of plaintiff's sex.

Plaintiff has suggested that:

> While defendants' allegations concerning the acquisitions purport to explain the differential and wages at the time of the acquisition, surely defendants do not contend that the acquisitions justify continued and prolonged differentials in wages over the course of a number of years. It would appear to be an inherent task upon an employer who laterally hires new employees to reevaluate any disparities created by the lateral hire.

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[1] Defenses to EPA claims have been characterized as affirmative defenses. *See, Mitchell v. Jefferson Co. Bd. of Education*, 936 F.2d 539, 544 (11th Cir. 1991).

(Plaintiff's Response to Defendants' Motion for Summary Judgment at 28). In support of this argument, plaintiff has cited no cases.

The undersigned magistrate judge finds this argument unavailing. "Red circling" is a term used to describe "certain unusual, higher than normal wage rates which are maintained for many valid reasons." *Glenn v. General Motors Corp.*, 841 F.2d at 1571; *Gosa v. Bryce Hospital*, 780 F.2d 917, 918 (11th Cir. 1986). Temporary reassignment may constitute one such reason. *Gosa, supra.* In *Gosa*, the male comparator's wage was "red circled" for two years. There is thus no requirement that an employer reevaluate pay scales because of disparities caused by red circling.

Based upon the foregoing, the defendants are entitled to summary judgment on plaintiff's Equal Protection Act claims. Hill and Nelson are not proper comparators because their jobs did not entail the same skill, effort, responsibility, and, in the case of Hill, the same working conditions as plaintiff's job. Beranek, Zimmerman and Johnson do not work at the same "establishment" as plaintiff. Finally, there is no genuine issue of material fact that Massimei, Gregg, and Trumbull were paid more because of a reason other than sex.

2. Plaintiff's Title VII Equal Pay Claims

Title VII also prohibits a discriminatory pay disparity. Specifically, Title VII provides:

> It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, *or otherwise to discriminate against any individual with respect to his compensation*, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1) (emphasis added). The Act further incorporates the EPA's exceptions to a pay discrepancy:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. *It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of Section 206(d) of Title 29.*

42 U.S.C. § 2000e-2(h) (emphasis added).

There are significant differences between Title VII and the EPA. For example, Title VII is broader in terms of its protection. Whereas the EPA, by its terms, applies to pay discrepancies between employees of opposite sexes, Title VII prohibits discriminatory pay practices based not only on an employee's sex, but also on an employee's race, color, religion, or national origin. Furthermore, as was discussed above, the EPA is limited to employees in the same "establishment." Title VII, by contrast, contains no such limitation. Finally, and most significantly, a

plaintiff proceeding under Title VII may have to prove discriminatory intent.

In Title VII, a plaintiff who proceeds upon a theory of disparate treatment must persuade the trier of fact that the defendant acted with discriminatory intent. This burden of persuasion never shifts, but remains with the plaintiff throughout the trial of the case. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *Hill v. Metropolitan Atlanta Rapid Transit Authority*, 841 F.2d 1533, 1538 (11th Cir. 1988), *modified*, 848 F.2d 1522 (11th Cir. 1988). To help the plaintiff, the courts have established a three-step analysis. First, the plaintiff has the burden of proving by a preponderance of the evidence a *prima facie* case of discrimination. Next, if the plaintiff proves a *prima facie* case, the burden shifts to the defendant to articulate some legitimate, non-discriminatory reason for the employment action. The burden of persuasion never shifts to the defendant; rather, the defendant's burden is merely one of production, not one of proof. *Perryman v. Johnson Products Co.*, 698 F.2d at 1142. Finally, if the defendant carries this burden, the plaintiff then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the defendant were actually a pretext for discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973).

Plaintiff may establish a *prima facie* case of discriminatory compensation under Title VII by showing the facts necessary to establish her case under the EPA. *Orr v. Frank R. MacNeill & Son, Inc.*, 511 F.2d 166, 171 (5th Cir.), *cert. denied* 423 U.S. 865 (1975), *Parker v. Burnley*, 693 F. Supp. 1138, 1150 (N.D. Ga. 1988), *modified*, 703 F. Supp. 925 (N.D. Ga. 1988). Thus, plaintiff must show: (1) she was paid a wage less than a co-employee of the opposite sex; (2) she performs equal work requiring equal skill, effort, and responsibility as that performed by the co-employee; and (3) she and the co-employee work under similar working conditions. This formulation is based

upon circumstantial evidence. Thus, if plaintiff succeeds in establishing a *prima facie* case, the defendant's burden is merely to produce evidence of a legitimate, non-discriminatory reason for the pay differential. Plaintiff must then show pretext or actual discrimination.

a. Beranek, Zimmerman, and Johnson

In the discussion above, the undersigned magistrate judge found that Beranek, Zimmerman, and Johnson were not proper comparators because they were not in the same establishment as plaintiff. As already noted, the "establishment" requirement of the EPA is not applicable to Title VII cases. Thus, this holding does not apply to plaintiff's Title VII claim.

Defendants concede that plaintiff can make out a *prima facie* case of discrimination in pay as compared with these three men. (Defendants' Motion for Summary Judgment at 51). Defendants argue, however, that the disparity is attributable to a factor other than sex. Specifically, defendants contend that as managers of security services provided to government facilities, these men had their salaries fixed in the bids made to obtain the contracts and that their salaries were paid for by the government which, pursuant to the contracts, paid all costs incurred. This constitutes a legitimate, nondiscriminatory reason.

In addition to his salary paid for by the government, Mr. Beranek received, while he was a project manager at the Livermore facility, a renegotiated compensation package. This resulted in Mr. Beranek's salary being increased to $70,000 per year. This was $12,000 more than originally provided for and the defendants had to pay the additional $12,000 per year directly (*i.e.* it was not billed to the government). Defendants contend that this salary increase resulted when Beranek received an offer of employment from Inel Laboratories which would compensate him at $70,000 a year. Thus, defendants had to pay Beranek more in order to retain him. This too constitutes a legitimate, non-

discriminatory reason for the pay disparity. *Horner v. Mary Institute*, 613 F.2d 706, 714 (8th Cir. 1980).

Defendant has failed to submit to the court any evidence which indicates that the defendants' justifications for the wage differentials constitute pretext. The record reflects that these salaries were set in the bid and that they would be paid for by the government. Furthermore, if defendants lost the contract at the next bid, these project managers would lose their jobs.[2] Thus, defendants were not ultimately responsible for the project managers' salaries; the project managers, with the exception of Beranek, would lose their jobs if defendants lost the contracts; and Beranek would be retained by the defendants at a salary less than plaintiff's if defendants lost the contracts. Defendants are entitled to summary judgment as to plaintiff's Title VII claims to the extent Beranek, Zimmermann, and Johnson are used as comparators because plaintiff has failed to show pretext.

b. William Hill

The undersigned magistrate judge found above that Hill was not a proper comparator and that plaintiff had thus failed to make out a case under the EPA. This finding is applicable to plaintiff's *prima facie* case under Title VII. Furthermore, even if plaintiff had established a *prima facie* case, Mr. Hill's responsibilities in creating a new business for the defendants and his different skills constitute a legitimate, non-discriminatory reason for his wage disparity. Yet, plaintiff has failed to present any evidence which would show that paying Hill more than plaintiff when Hill was an investigator hired to create an investigations division for defendants while plaintiff administered existing contracts was a

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[2] This was not the case for Mr. Beranek who negotiated guaranteed employment with the defendant should the contracts be lost. However, the guaranteed employment with the defendant was at an annual salary of $45,000, less than plaintiff's 1990 salary of $50,000. *See*, D.E. 5 to Plaintiff's Dep.; and Plaintiff's Aff. and the Exhibits Attached Thereto.

mere pretext. Accordingly, defendants are entitled summary judgment on plaintiff's Title VII claim to the extent Hill is used as a comparator.

c. Larry Nelson

As discussed above, plaintiff has failed to establish a *prima facie* case of discrimination under the EPA using Larry Nelson as a comparator. This is equally applicable to plaintiff's claim under Title VII. Thus, defendants are entitled to summary judgment on this claim.

Even if plaintiff had established a *prima facie* case, the defendants have met their burden of producing a legitimate, non-discriminatory reason for Mr. Nelson's higher wage rate. Specifically, defendants argue that Mr. Nelson had been with the company for 10 years more than plaintiff and that this accounts for the pay discrepancy. Accordingly, plaintiff was required to show pretext or discriminatory intent.

Plaintiff has not provided any evidence or argument in an effort to show pretext. The Supreme Court has held that the EPA "contemplates that a male employee with 20 years' seniority can received a higher wage than a woman with two years' seniority." *Corning Glass*, 417 U.S. at 204. Although the seniority claim for Mr. Nelson is not proper under the "seniority system" defense to the EPA, *Morgado v. Birmingham-Jefferson County Civil Defense Corps*, 706 F.2d 1184, 1189-90 (11th Cir. 1983), *cert. denied*, 464 U.S. 1045 (1984), it does fall under the fourth defense - a factor other than sex. *See, Blocker v. AT&T Technology Systems*, 666 F. Supp. 209, 213 (M.D. Fla. 1987) (citing cases). As this defense is applicable to Title VII cases, *see*, 42 U.S.C. § 2000e-2(h), and plaintiff has failed to produce evidence showing pretext, defendants are entitled to summary judgment on this claim to the extent Nelson is used as a comparator.

d. Massimei, Gregg and Trumbull

With respect to Messrs. Massimei, Gregg and Trumbull, the defendants again concede that plaintiff has established a *prima facie* case. However, as noted above, the defendants argue that the acquisition by the defendants of the companies in which these three men were owners or principals constitutes a reason other than sex. The defendants have thus met their burden of coming forward with a legitimate, non-discriminatory reason for the pay disparity.

Plaintiff has failed to show that the defendants' legitimate, non-discriminatory reason is mere pretext. Plaintiff does not dispute the fact that these three men were paid a higher salary as a result of the defendants' acquisition of their security companies. Plaintiff contends that this merely creates an issue of fact. This argument was discussed above when the court considered plaintiff's claim under the EPA. This argument is especially unavailing under Title VII. As already noted, *under Title VII plaintiff has the burden of proving discrimination*. Thus, it was incumbent upon plaintiff to at least raise a material question of fact as to whether the defendants' legitimate, non-discriminatory reason for paying Massimei, Gregg and Trumbull more than plaintiff was a mere pretext. Plaintiff has failed to raise any such issue. Accordingly, the defendants are entitled to summary judgment with respect to plaintiff's Title VII claims when Massimei, Gregg and Trumbull are used as comparators.

For the foregoing reasons, the defendants are entitled to summary judgment with respect to plaintiff's claims of discriminatory pay practices under Title VII. Plaintiff failed to establish a *prima facie* case with respect to Messrs. Nelson and Hill. Furthermore, with respect to both of these comparators, the defendants have produced legitimate, non-discriminatory reasons for the pay disparities. Defendant has not produced any evidence which raises a material question of fact as to the pretext

of these legitimate, non-discriminatory reasons. Although plaintiff did establish a *prima facie* case with respect to Messrs. Massimei, Gregg, Trumbull, Beranek, Zimmerman, and Johnson, the defendants again produced legitimate, non-discriminatory reasons which account for the pay disparities between plaintiff's salary and the salaries received by these individuals. The defendant has failed to establish any evidence which establishes a material question of fact as to whether such legitimate, non-discriminatory reasons are mere pretext. Accordingly, the defendants are entitled to summary judgment with respect to plaintiff's Title VII equal pay claims.

C. Plaintiff's Employment-Related Misconduct Does Not Bar Plaintiff's Claim

Defendant argues that after acquired evidence of employment-related misconduct on plaintiff's part bars her lawsuit. Specifically, defendant contends that plaintiff engaged in conduct which, if known to the defendants, would have resulted in plaintiff's discharge. Assuming, *arguendo*, that defendants would have discharged plaintiff had defendants known of this misconduct, plaintiff's claims are not barred. *Wallace v. Dunn Construction Co.*, 968 F.2d 1174 (11th Cir. 1992). Rather, such after acquired evidence of misconduct would merely preclude plaintiff from obtaining reinstatement, front pay, and an injunction against further unlawful practices. 968 F.2d at 1181-82. Because plaintiff has not requested such relief in her prayer for relief, *Dunn* is not implicated. Accordingly, defendants' Motion for Summary Judgment is DENIED on this ground.

D. Plaintiff's Claim of Intentional Misrepresentation

In Count 3 of the complaint, plaintiff attempts to set forth at least three separate state law tort claims. *See*, Docket Entry [9-1] at ¶ 43. One of these claims is a claim for misrepresentation. *Id.* Specifically, plaintiff avers that the defendants represented that plaintiff was performing at a level which would justify her

receiving substantial increases in compensation and benefits, Docket Entry [9-1] at ¶ 32, and that her supervisor, Don Bottom, informed plaintiff that her personal relationships and human relation skills were so lacking that she was being maintained in employment only through Don Bottom's protection. *Id.* at ¶ 33.

Plaintiff was requested, in defendants' Second Interrogatories and Requests for Production to further describe the conduct which plaintiff contends constituted misrepresentation. Plaintiff responded that:

> The conduct and events that give rise to plaintiff's cause of action for misrepresentation were continuing and ongoing throughout her employment as Vice President — Administration at Advance. Beginning in 1981, plaintiff was repeatedly assured that her position would be added to the Figgie Executive Compensation Program (the "Program). Plaintiff's position was not added to the Program until 1985.
>
> The misrepresentations continued after plaintiff's position was added to the Program. In 1985, Mr. Bottom assured plaintiff that her salary would be increased by the forthcoming reclassification of her position, which was to occur after the Gregg acquisition. In 1986, Mr. Bottom represented to plaintiff that her position would not be reclassified, because only base salaries of presidents were tied to division sizes, not each president's vice presidents.
>
> Again in 1989 and 1990, on more than one occasion, Mr. Bottom represented to plaintiff that her salary would be adjusted and that he was seeking a raise in compensation for plaintiff. Despite plaintiff's more than acceptable work level, plaintiff never received any of the objects of the assurances made by defendants' agent.

(Plaintiff's Objections and Responses to Defendant Advance Security, Inc. Second Interrogatories and Requests for Produc-

tion, attached as D.E., 5 to defendants' Motion for Summary Judgment, Docket Entry [59-1] at ¶¶ 18 and 21).

The assurances which form the basis for plaintiff's claim of misrepresentation relate to pay bonuses and increases in wages. These assurances relate to future compensation. Under Georgia law, "a promise to change the terms of compensation in the future is not enforceable. A promise to pay a bonus or to increase wages in the future is clearly an executory obligation." *E.D. Lacey Mills, Inc. v. Keith*, 183 Ga. App. 357, 359 S.E.2d 148, 153 (1987). *See also, Walker v. General Motors Corp.*, 152 Ga. App. 526, 263 S.E.2d 266 (1979). An action for fraud cannot lie when "predicated on a promise which is unenforceable at the time it is made." *Beasley v. Ponder*, 143 Ga. App. 810, 240 S.E.2d 111 (1977). *See also, Livernois v. Medical Disposables, Inc.*, 837 F.2d 1018, 1023 (11th Cir. 1988); *Alston v. Brown Transport Corp.*, 182 Ga. App. 632, 356 S.E.2d 517 (1987). Accordingly, defendants are entitled to summary judgment on plaintiff's claim of misrepresentation.

E. Plaintiff's Claim of Invasion of Privacy

Plaintiff has attempted to assert a claim for invasion of privacy. [9-1] at ¶¶ 36 and 43. Defendants have alleged that this claim is barred by the applicable statute of limitations.

In Georgia, an action of invasion of privacy is an action for injuries to the person. *Hudson v. Montcalm Publishing Corp.*, 190 Ga. App. 629, 379 S.E.2d 572 (1989). "Actions for injuries to the person shall be brought within two years after the right of action accrues." O.C.G.A. § 9-3-33. The conduct which formed the factual basis for plaintiff's averment in paragraph 36 of her complaint (Bottom's meeting with management and denying the existence of a personal relationship between himself and plaintiff) occurred in 1985. (Dep. of Marilyn Mulhall at 251-58). Furthermore, in response to interrogatories propounded by the defendants, plaintiff stated that "on or about fall 1987 to early

1988, Mr. Bottom made certain statements to Mr. Trumbull during the Titan acquisition from which one could infer that plaintiff was very capable, but difficult to work with. Mr. Bottom manipulated plaintiff's reputation by tainting third persons' first impressions of plaintiff. Previously, on or about 1965 [sic], Mr. Bottom made similar statements to Mr. Gregg during the Gregg acquisition." (Plaintiff's Objections and Response to Defendant Advance Security, Inc.'s Third Interrogatories and Requests for Production, attached as D.E. 10 to Defendants' Motion for Summary Judgment, Docket Entry [59-1] at ¶ 22). Beyond these three events, plaintiff has failed to provide any other specific acts which plaintiff contends constitutes a tortious invasion of privacy.

The complaint in this case was filed on May 17, 1991. *See,* Docket Entry [1-1]. The complaint was filed more than two years after the most recent event which plaintiff contends constitutes a tortious invasion of privacy. Accordingly, the claim is time-barred. The defendants are entitled to summary judgment on this claim.

F. Plaintiff's Claim of Intentional Infliction of Emotional Distress

Plaintiff has asserted a claim for intentional infliction of emotional distress. The defendants contend that they are entitled to summary judgment because the conduct which plaintiff avers gives rise to this claim is insufficient to constitute intentional infliction of emotional distress.

Georgia recognizes the tort of intentional infliction of emotional distress. "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress. . . ." *Yarbray v. Southern Bell Telephone & Telegraph Co.*, 261 Ga. 703, 409 S.E.2d 835, 837 (1991) (quoting the Restatement 2d of Torts, § 46(1) (1965)). "Whether a claim rises to the requisite

level of outrageousness and egregiousness to sustain a claim for intentional infliction of emotional distress is a question of law." *Yarbray*, 409 S.E.2d at 838. Furthermore, whether the emotional distress suffered is severe is also a question of law for the court to decide. *Id.*, citing *Bridges v. Winn-Dixie Atlanta, Inc.*, 176 Ga. App. 227, 335 S.E.2d 445, 448 (1985).

Recovery for intentional infliction of emotional distress has been authorized only where the defendant's actions were so terrifying as to naturally give rise to such intense feelings of humiliation, embarrassment, or fright, as to cause severe emotional distress to plaintiff. *Moses v. Prudential Ins. Co.*, 187 Ga. App. 222, 369 S.E.2d 541, 543 (1988). This standard is a stringent one. In *Peoples v. Guthrie*, 199 Ga. App. 119, 404 S.E.2d 442 (1991), *cert. denied*, (May 15, 1991), the court held "[a] false accusation of dishonesty or lack of integrity in connection with one's employment . . . is a common vicissitude of ordinary life." 404 S.E.2d at 444. Such conduct cannot, as a matter of law, create *severe* emotional distress. *See*, *Peoples*, *supra*, (citing cases); *Moses*, 369 S.E.2d at 544.

Based upon the foregoing, even a successful claim under the Equal Pay Act could not form the basis for a separate tort of intentional infliction of emotional distress. In addition, defendant Bottom's conduct of (a) allegedly making false representations concerning increases in compensation, ¶ 33 of the Complaint; (b) informing plaintiff that her personal skills were so lacking that she was not discharged solely because of Bottom's protection, ¶ 33 of the Complaint; (c) allegedly seeking a personal relationship with plaintiff for the benefit of Bottom and the company only, ¶ 35 of the Complaint; and (d) allegedly meeting with members of management and denying the existence of relationship between himself and plaintiff and further forcing plaintiff to deny same, ¶ 36 of the Complaint, does not rise to the level of extreme and outrageous conduct.

Finally, the record is devoid of any evidence showing severe emotional distress. As plaintiff has failed to produce evidence concerning the severe emotional distress, summary judgment is appropriate on this claim.

III. Plaintiff's Motion to Amend

Plaintiff has moved to amend her complaint to state a cause of action under the Civil Rights Act of 1991. *See*, Docket Entry [53-1].

On November 21, 1991, the Civil Rights Act of 1991 (Act) became law. To determine whether the Act is to be applied retroactively, one begins with the statute itself. *Consumer Products Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980). The Act states that it "shall take effect upon enactment." Act, § 402(a). It does not contain any indication as to retroactivity. As one district judge has stated, "Congress in this new civil rights legislation punted on the question of whether or not the Act applies retroactively." *King v. Shelby Medical Center*, 779 F. Supp. 157 (N.D. Ala. 1991).

The court believes that the issues turn on the proper presumption to be applied to the Act. Unfortunately, there are two that exist which appear to be the antithesis of one another. *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990). The first and most established is that "retroactivity is not favored in law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988). The other provides that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974).

The Court of Appeals for the Eleventh Circuit has used both *Bradley* and *Bowen*. *See*, *Wright v. Director, Federal Emer-*

gency Management Agency, 913 F.2d 1566 (11th Cir. 1990). Moreover, the Eleventh Circuit has also stated that "Courts normally presume that a legislative enactment is to apply prospectively, . . . and the presumption is a strong one." *Jackson v. People's Republic of China*, 794 F.2d 1490, 1497 (11th Cir. 1986), *cert. denied*, 480 U.S. 917 (1987). Nevertheless, a panel of the Eleventh Circuit had held that it was bound by *Bradley* until "otherwise directed by the United States Supreme Court or the Eleventh Circuit *en banc*." However, this decision was vacated by the Supreme Court. *United States v. Peppertree Apartments*, 942 F.2d 1555, 1561 n.3 (11th Cir. 1991), *vacated, sub nom, Bailes v. United States*, ___ U.S. ___, 112 S.Ct. 1755, 118 L.Ed.2d 419 (1992).

Six circuit courts of appeal have addressed the issue of retroactivity of the Civil Rights Act of 1991. The D.C., Fifth, Sixth, Seventh and the Eighth Circuits have found that the Act is not retroactive. *Gersman v. Group Health Association, Inc.*, ___ U.S. ___, 1992 WL 220163 (D.C. Cir. Sept. 15, 1992); *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363 (5th Cir. 1992); *Vogel v. Cincinnati*, 959 F.2d 594 (6th Cir. 1992), *cert. denied*, ___ U.S. ___ (October 5, 1992); *Luddington v. Indiana Bell Telephone Co.*, 966 F.2d 225 (7th Cir. 1992); *Mozee v. American Commercial Marine Service Co.*, 963 F.2d 929 (7th Cir.), *cert. denied*, ___ U.S. ___ (October 5, 1992); *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992). To date, only the Ninth Circuit has found the Act to be retroactive. *See, Davis v. City & County of San Francisco*, ___ F.2d ___, 1992 WL 251513, 1992 U.S. App. Lexis 24836 (9th Cir. Oct. 6, 1992).

After careful review of the cases, the court DENIES plaintiff's Motion to Amend. The court finds persuasive the reasoning of Justice Scalia in *Bonjorno*, 494 U.S. 827 (Scalia, J., concurring); the court in *James v. American International Recovery, Inc.*, No. 1:89-cv-321-RHH (N.D. Ga. June 1992); the court in *Washington v. Keebler Company, Inc.*, No. 1:89-cv-765-ODE (N.D. Ga.

June 1992); and the court in *Van Meter v. Barr*, 778 F. Supp. 83 (D. D.C. 1991). The court also notes that the EEOC, the federal agency charged with administering the civil rights laws, has determined that the Act applies prospectively only.

IV. The Order to Show Cause

On May 27, 1992, the undersigned magistrate judge directed the defendants to submit an itemized list of costs. Plaintiff was directed to show cause why sanctions should not be levied against her. This Order was issued in connection with a second Motion to Compel filed by defendants. The first Motion to Compel was filed after plaintiff refused to answer questions concerning her relationship with Don Bottom. *See*, Docket Entry [27-1]. At that time, plaintiff based her refusal to answer on a state privilege. The undersigned magistrate judge found that federal privilege law, as opposed to state privilege law, was applicable and granted the Motion to Compel. Thereafter, plaintiff was deposed again on February 28, 1992. At this deposition, plaintiff again refused to answer questions concerning her relationship with Don Bottom. This time, plaintiff asserted her Fifth Amendment privilege against self-discrimination. As a result, defendants filed a Motion to Dismiss. *See*, Docket Entry [41-1].

The undersigned magistrate judge contemplated sanctions *not* because plaintiff had asserted a constitutional right, but because having relied unsuccessfully on one basis for refusing to answer, the plaintiff "permitted both parties to go to the time and expense of scheduling and participating in another deposition at which plaintiff would again decline to answer defendants' questions." Docket Entry [52-1] at 2-3. The better practice would have been to bring the issue before the court prior to the second deposition.

Based upon the undersigned magistrate judge's findings, recommendations, and order above, IT IS FURTHER RECOMMENDED that sanctions not issue in this case. Imposition of sanctions would further delay this case.

V. CONCLUSION

For the foregoing reasons, the undersigned magistrate judge makes the following recommendations. Defendants' Motion for Summary Judgment, Docket Entry [59-1], should be GRANTED. Plaintiff's Title VII promotion claim is time-barred. Plaintiff's claim for misrepresentation cannot lie because it is based upon an unenforceable promise. Her claim for invasion of privacy fails because it is barred by the statute of limitations. Her claim for intentional infliction of emotional distress cannot stand because the conduct complained of is neither extreme nor outrageous, and because plaintiff did not suffer severe emotional distress. Plaintiff's equal pay claims must also fail. Under the EPA, Beranek, Zimmerman, and Johnson are not proper comparators because they were not employed in the same establishment. Massimei, Gregg and Trumbull are not proper comparators because their salaries may be said to be "red circled." Nelson and Hill are not proper comparators because their jobs entailed different skills, efforts, responsibilities and, in the case of Hill, working conditions, than did plaintiff's job. These findings are applicable to plaintiff's Title VII equal pay claims, except for Beranek, Zimmerman and Johnson. However, with respect to all eight comparators, defendants have produced legitimate non-discriminatory reasons for the pay disparity. Plaintiff has failed to show pretext therefor.

IT IS FURTHER RECOMMENDED that sanctions, Docket Entry [52-1], not issue in this case. Finally, IT IS ORDERED that plaintiff's Motion to Amend, Docket Entry [53-1], be DENIED.

SO ORDERED, REPORTED AND RECOMMENDED, this 9th day of November, 1992.

/s/ John E. Dougherty
JOHN E. DOUGHERTY
UNITED STATES
MAGISTRATE JUDGE

Supreme Court, U.S.
FILED
AUG 19 1994
OFFICE OF THE CLERK

(2)

No. 94-123

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ADVANCE SECURITY, INC. and
FIGGIE INTERNATIONAL, INC.,

Petitioners,

v.

MARILYN M. MULHALL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

JAMES R. HARPER
(Counsel of Record)
RICHARD N. HUBERT
DAVID P. THATCHER
CHAMBERLAIN, HRDLICKA,
WHITE, WILLIAMS & MARTIN
233 Peachtree Street, N.E.
Suite 1400
Atlanta, Georgia 30303
(404) 659-1410
Attorneys for Respondent.

Washington, D.C. • THIEL PRESS • (202) 328-3286

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QUESTION PRESENTED

1. Whether, in the context of an appellate court's *de novo* review of a district court's granting a defense summary judgment, the Eleventh Circuit Court of Appeals was correct in finding that material questions of fact exist with regard to Respondent's claims under the Equal Pay Act, 29 U.S.C. §206(d), and under Title VII, 42 U.S.C. §2000e, *et seq.*?

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No. 94-123

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ADVANCE SECURITY, INC. and
FIGGIE INTERNATIONAL, INC.,

Petitioners,

v.

MARILYN M. MULHALL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Marilyn M. Mulhall ("Respondent") respectfully requests that this Court deny the Petition for a Writ of Certiorari pending in this matter filed by Advance Security, Inc. and Figgie International, Inc. (collectively "Petitioners").

I.
STATEMENT OF THE CASE

In November 1978, petitioner Advance Security, Inc. ("petitioner Advance") hired Respondent as Manager of Services. Respondent was promoted to Manager of Administration in October 1979 and given responsibility for petitioner Advance's important and lucrative contract with Sandia National Laboratories at Tonapah, Nevada. Petitioner Advance promoted Respondent to Vice-President, Administration in January 1981, at which time the position of Manager, Industrial Relations was eliminated, and the majority of its duties consolidated into the Vice-President, Administration position. During 1982, petitioner Advance shifted responsibility for the management of the hourly employee group medical program from Vice-President, Controller to Vice-President, Administration. T. Michael Roquemore held the position of Vice-President, Controller at the time of the transfer of responsibility.

In August 1984, Respondent became eligible to participate in the Figgie Executive Compensation Bonus Program. At the time of admission, Respondent was the only woman participating in petitioner Figgie's bonus program for executives. Petitioner Advance acquired two companies in the summer and fall of 1985. Petitioner Advance acquired Metro Security of Tampa, Florida, in August 1985, and Gregg Security of Pittsburgh, Pennsylvania, in November 1985. In September 1985, petitioner Advance was awarded the Livermore, California contract by Sandia National Laboratories, another lucrative government security contract. Respondent was responsible for the account and personally directed the transition and startup of the Livermore facility.

In December 1985, T. Michael Roquemore held the position of Vice-President, Controller, one of the positions to which Respondent contends her former position is comparable. At that time, Vice-President, Controller and Vice-President, Administration were classified identically by petitioner Figgie as job class IV. Respondent was evaluated by her supervisor on an executive performance appraisal dated December 9, 1985, with 45.5 points. Her supervisor recommended a merit increase in plaintiff's compensation of 12%. Petitioner Figgie reduced the increase in Respondent's compensation from the recommended amount to 6.7%. Mr. Roquemore also was evaluated by his supervisor on an executive performance appraisal dated December 9, 1985, with 34.2 points. Mr. Roquemore received a merit increase of 5.9% of his compensation.

Representatives of petitioner Advance assured Respondent that the job classification of her former position would be re-evaluated after the various acquisitions by petitioner Advance. In December 1986, the position of Vice-President, Controller was elevated from job class IV to job class V. Respondent's former position of Vice-President, Administration, remained at job class IV. In August 1987, petitioner Advance acquired Titan Security of Mountain View, California. Only one month later, petitioner Advance shifted responsibility for its workers' compensation program and hourly group medical program from Vice-President, Controller to Respondent's former position of Vice-President, Administration. In December 1988, petitioner Advance hired William T. Hill to develop a separate investigations division of petitioner Advance.

In January 1989, petitioner Advance terminated Mr. Roquemore from the position of Vice-President, Con-

troller, which at the time of termination was classified as job class V. In March 1989, Larry V. Nelson transferred from petitioner Figgie to petitioner Advance to fill the position of Vice-President, Controller. At the time of Mr. Nelson's transfer, the position of Vice-President, Controller was reclassified as job class VII. Despite Respondent's exceptional performance and profitability, Respondent's job class was stifled at job class IV, three job classification categories below Mr. Nelson, Vice-President, Controller. It is particularly noteworthy that within petitioner's compensation system, each position is classified at a particular job class, which in turn establishes a range within which a particular employee's salary is set. Based on the range of salary available for each job class, two employees whose positions are classified as identical job classes may receive substantially differing amounts of annual compensation.

Respondent filed suit against petitioners on May 17, 1991, alleging sexual discrimination based on Petitioners' denial to Respondent of equal pay and failure to promote Respondent on two occasions to the position of president of petitioner Advance. For purposes of her claims of denial of equal pay, Respondent compares her compensation as Vice-President, Administration to the positions of Vice-President, Operations, Vice-President, Controller, President of the ICA division of petitioner Advance, Regional Manager, and Project Manager. The district court granted Petitioners' motion for summary judgment. On appeal, the Eleventh Circuit vacated the district court's order on Respondent's Equal Pay Act ("EPA") claims, except with respect to William Hill's job, and on Respondent's Title VII claim, except with respect to Edward Trumbull, and remanded the case for further

consideration. The Eleventh Circuit found that genuine issues of material fact exist with regard to Respondent's EPA claims on the issues of (1) whether Respondent and Group 1 comparators worked in a single establishment; (2) whether Respondent and the Group 3 comparators performed substantially similar work; and (3) Petitioner's failure to establish their affirmative defense as a matter of law as relates to Groups 1, 3 and 4 comparators. The Eleventh Circuit also found that, regarding Respondent's Title VII claims, Respondent established a prima facie case and responded to Petitioners' legitimate non-discriminatory explanations for the pay disparities with evidence of pretext sufficient to raise a genuine factual question appropriate for consideration by a jury with respect to the comparators in Groups 1, 2 and 3, and as to Group 4 comparators Massemei and Gregg. *Mulhall v. Advance Security, Inc.*, 19 F.3d 586 (11th Cir. 1994).

II.

REASONS TO DENY THE WRIT

A. The Decision of the Eleventh Circuit Court of Appeals Expressly Disavowed Utilizing Comparable Worth in its EPA and Title VII Analysis and Represents Merely a *De Novo* Review in the Context of Summary Judgment.

1. The Eleventh Circuit reviewed Petitioner's contentions in the context of their admission that recent job performance, profitability of the company, and contribution of each individual employee were the criteria on which salary increases were based.

The Eleventh Circuit did not rely on the theory of comparable worth in its *de novo* review of the district court's decision. The Eleventh Circuit reviewed Petitioners' contentions on summary judgment in the context of the parameters of Rule 56 of the Federal Rules of Civil Procedure. In the discovery phase of the litigation, Respondent asked Petitioners to state each and every fact with particularity that Petitioners considered in setting the amount of compensation to be paid to Respondent and her comparators at the time of hiring and each time each employee received a salary increase. 19 F.3d at 596-97 n.25. Petitioners responded, in relevant part, that general considerations included recent job performance, *profitability of the company, and the contribution of each individual employee. Id.* Thus, Petitioners made Respondent's and her comparators' monetary contributions to the profitability of Petitioners relevant to the disparity in wages. The Eleventh Circuit's consideration of profits attributable to each comparator thus serves an important purpose in its analysis of

Respondent's EPA and Title VII claims. In the context of EPA claims, the consideration of profits is relevant to determine whether Petitioners satisfied their burden of production and persuasion on their affirmative defense. In addition, they are relevant in the context of Respondent's Title VII claims to the issue of whether Petitioners' legitimate reasons for the pay disparities are merely pretextual. Nonetheless, if Petitioners had not made profits relevant through their discovery response, the Court might be faced with the issue of comparable worth. In this case, it is not.

The record contains no evidence supporting a comparison of jobs based on the value of each job to Petitioners. Under the theory of comparable worth, a plaintiff might claim increased compensation on the basis of a comparison of the intrinsic worth or difficulty of her job with that of other jobs in the same organization or community. *County of Washington v. Gunther,* 452 U.S. 166 (1981). In such a case, the plaintiff would call upon the court to make its own subjective assessment of the value of the male and female jobs, or to attempt by statistical technique or other method to quantify the effect of sex discrimination on the wage rates. *Id.* at 181. In fact, a plaintiff who seeks a review of her depressed wages on the theory of comparable worth may be forced into that cause of action on the basis that the comparison is between positions with genuinely different work classifications. *Christensen v. State of Iowa,* 563 F.2d 353, 356 (8th Cir. 1977). If the positions that the plaintiff seeks to compare are genuinely different, she would be excluded from the Equal Pay Act and Title VII case. Thus, petitioners essentially argue that the Eleventh Circuit's decision, finding that Respondent's former position of Vice-President, Administration

may be properly compared to those of her comparators, based on the record before it and in the context of summary judgment, was incorrect. Petitioners craftily disguise their dissatisfaction with the Eleventh Circuit's review of the evidence on summary judgment under the veil of comparable worth.

2. Petitioners have presented their challenge to the Eleventh Circuit's *de novo* review of their motion for summary judgment under the label of comparable worth.

The Eleventh Circuit reviewed Petitioners' motion for summary judgment on plaintiff's Title VII claims in the *McDonnell Douglas Burdine* framework. 19 F.3d at 597 (quoting *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1528 (11th Cir. 1992) (citing *McDonnell Douglas v. Green*, 411 U.S. 792 (1973))). If a plaintiff makes a prima facie case under the EPA, she simultaneously establishes facts necessary to go forward with her Title VII claim. *EEOC v. White & Sons Enters.*, 881 F.2d 1006 (11th Cir. 1989). If the petitioner meets its burden of production associated with articulating a legitimate, non-discriminatory reason for the pay disparity, the prima facie case is rebutted and drops from the case. *Texas Dep't of Community Affairs v. Burdine*, 45 U.S. 248 (1981).

The plaintiff must then demonstrate that the employer's legitimate reason was in fact pretextual. The Eleventh Circuit noted that courts have recognized that an employer's true motivations are especially difficult to establish, making such factual determinations "generally unsuitable for disposition at the summary judgment stage." 19 F.3d at 598; *Hairston v. Gainesville Sun Pub.*

Co., 9 F.3d 913, 919 (11th Cir. 1993); *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 716 (1983). "In order to establish pretext, the plaintiff is not required to introduce evidence beyond that already offered to establish the prima facie case." 9 F.3d at 921. "Evidence already introduced to establish the prima facie case may be considered, and 'indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross examination of the defendant, will suffice to discredit the defendant's explanation' and establish pretext." *Id.* (quoting *Burdine*, 450 U.S. at 256 n.10). Accordingly, the grant of summary judgment, though appropriate when evidence of discriminatory intent is totally lacking, is generally unsuitable in Title VII cases in which the plaintiff has established a prima facie case because of the "illusive factual question" of intentional discrimination. *Burdine*, 45 U.S. at 256.

Within this framework, the Eleventh Circuit found that Respondent presented evidence of pretext sufficient to overcome Petitioners' motion for summary judgment. Rather than relying on the theory of comparable worth, the Eleventh Circuit found that the disparity of pay, when considered in light of a comparison of Respondent's contributions to Petitioners' profitability with her comparators' contributions to Petitioners' profitability, which comparison was based on Petitioners' admission that they considered such criteria in determining increases in compensation, resulted in the Eleventh Circuit's concluding that a material question of fact exists as to whether Petitioners' articulated reasons are pretextual.

The Eleventh Circuit affirmed the district court's granting summary judgment to Petitioners with regard

to comparator Trumbull on plaintiff's Title VII claim.[1] The Eleventh Circuit vacated and remanded the district court's decision with regard to comparators Massemei and Gregg. Petitioners articulated a legitimate, nondiscriminatory reason for the disparity in wages by contending that the Group 4 comparators were paid more because their salaries were negotiated as a part of the sale of their businesses to Petitioners. The Eleventh Circuit found that, when Trumbull's contract terminated in 1992, his salary dropped dramatically to an amount below Respondent's 1991 salary. The Eleventh Circuit held that the adjustment of Trumbull's salary negated Respondent's claim of pretext as to this comparator. The Eleventh Circuit's affirming the district court's decision on Respondent's Title VII claims with regard to Trumbull belies Petitioners' assertion in this Court that the Eleventh Circuit relied upon comparable worth. The Eleventh Circuit said that Petitioners' legitimate reason was not a pretext, since Trumbull's salary was adjusted downward after the term of the contract. Yet, Petitioners failed to explain their reasons for not adjusting Massemei and Gregg's pay once their contracts terminated. The adjustment of Trumbull's salary actually begs the question of why there was a prolonged and pervasive disparity in pay between Respondent and Massemei and Gregg years after the contracts for the purchase of their businesses terminated. The Eleventh Circuit thus found that Respondent satisfied her burden of showing evidence of pretext sufficient to overcome Petitioners' motion for summary judgment with respect to Massemei and Gregg, but not with respect to Trumbull. The Eleventh Circuit simply did not rely on the theory of comparable worth.

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[1] Comparators Massemei, Gregg and Trumbull are referred to herein as "Group 4" comparators consistent with the terminology of the Eleventh Circuit's opinion. 19 F.3d at 588.

B. EPA's Factor Other Than Sex Affirmative Defense is Alive and Well in the Eleventh Circuit, But Not Proved by Petitioners in the Context of Summary Judgment.

The Eleventh Circuit found that Petitioners failed to satisfy their burdens of production and persuasion on their affirmative defenses to Respondent's EPA claims. In a case brought under the EPA, the initial burden rests with the plaintiff to show "that an employer pays different wages to employees of opposite sexes 'for equal work on jobs the performance of which requires equal skill, effort, and responsibility.' " *Schwartz v. Florida Bd. of Regents,* 807 F.2d 901, 907 (11th Cir. 1987) (quoting *Corning Glass Works v. Brennan,* 417 U.S. 188 (1974)). In addition, the comparators must work in the same "establishment" as the plaintiff. *Brennan v. Goose Creek Consol. Indep. Sch. Dist.,* 519 F.2d 53, 57 (5th Cir. 1975). The plaintiff establishes a prima facie case when she satisfies both components as applied to merely one comparator. *Mitchell v. Jefferson County Bd. of Educ.,* 936 F.2d 539 (11th Cir. 1991); *EEOC v. White & Son Enters.,* 881 F.2d 1006 (11th Cir. 1989).

Once the plaintiff establishes her prima facie EPA case, the burden then shifts to the defendant to prove by a preponderance of the evidence that the disparity in pay is justified by one of the EPA's affirmative defenses. *Brock v. Georgia Southwestern College,* 765 F.2d 1026 (11th Cir. 1985). In order to satisfy its burden, the defendant must show that the factor of sex provided *no basis* for the wage differential. *Gosa v. Bryce Hosp.,* 780 F.2d 917 (11th Cir. 1986) (the requirements for proving an exception are not met unless the factor of sex provides no part of the basis for the wage differential).

The Eleventh Circuit relied on the foregoing, well-established principles of EPA law, in the context of summary judgment, which requires the court to view the evidence in the light most favorable to the non-movant, and found merely that, based on the record, plaintiff should not be foreclosed from her day in court. *Waters v. Turner, Wood & Smith Ins. Agency, Inc.*, 874 F.2d 797 (11th Cir. 1989). The Eleventh Circuit set forth the standard it applied as follows: "If plaintiff's evidence, with all inferences drawn in her favor, establishes an EPA violation and there is sufficient evidence such that a jury could find in her favor, then summary judgment for defendants is improper." 19 F.3d at 592. By way of example, the Eleventh Circuit stated that it was "*not convinced* that skills needed in the controller position, even as it is currently structured, are not substantially similar to those of the Vice-President for Administration." 19 F.3d at 594 (emphasis supplied). Thus, Petitioners' dissatisfaction is with the Eleventh Circuit's *de novo* review of the evidence in the record. The Eleventh Circuit reviewed the evidence based on Petitioners' admitted criteria in determining increases in compensation. As Petitioners' dissatisfaction is actually with a review of the evidence, this Court should deny their Petition for Writ of Certiorari.

Furthermore, the Eleventh Circuit found that, with regard to Respondent's EPA claim concerning Massemei, Gregg and Trumbull, Petitioners failed to establish that there is no genuine issue of material fact as to its affirmative defense that the disparity in wages were simply part of a larger negotiation picture surrounding the purchase of the comparators' businesses. 19 F.3d at 596-97. The rule of law Petitioners contend the Eleventh Circuit created in its opinion is inventive and not

supported by the decision. Although the Eleventh Circuit stated that Petitioners "seemingly suggest that market forces demanded paying higher salaries to [Massemei, Gregg and Trumbull] in order to sweeten the purchase deals", 19 F.3d at 596, the Eleventh Circuit did not rest its decision on the market forces.

> We do not hold that an employer may never pay higher wages to a new employee whose position results from the purchase of his business. We simply hold that the record before us does not establish as a matter of law that comparators' superior experience, training or ability, or exigent business circumstances justified greater compensation than received by plaintiff who occupied a similar position for five years before the comparators' arrival and who consistently out performed two of the three comparators on the very measures defendants admit constitute a basis for setting salaries. Nothing in the record establishes that the disparity in plaintiff's and the comparators' wages was attributable solely to any recognized exception to the EPA.

19 F.3d at 597. Based on the foregoing language limiting the Eleventh Circuit's decision, it is disingenuous for Petitioners to argue in this Court that the Eleventh Circuit's decision stands for the maxim that "the employer has an obligation to *immediately* raise the salaries of other employees doing substantially equal work to the same level, regardless of the reason for the pay differential." Petition for Writ of Certiorari at 19-20 (emphasis supplied). Again, the Eleventh Circuit found that Petitioners failed to prove their affirmative defense in the context of a motion for summary judgment. A genuine issue of material fact exists concerning Petitioners' "failure to at some point raise [Respondent's]

pay to match or exceed that of the comparators when her profit center out performed Massemei's during four out of five years and Trumbull's during all three years of comparison." 19 F.3d at 596.

C. Conclusion.

For all the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

JAMES R. HARPER
(Counsel of Record)
RICHARD N. HUBERT
DAVID P. THATCHER
CHAMBERLAIN, HRDLICKA,
WHITE, WILLIAMS & MARTIN
233 Peachtree Street, N.E.
Suite 1400
Atlanta, Georgia 30303
(404) 659-1410
Attorneys for Respondent.

August 19, 1994

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No. 94-123

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ADVANCE SECURITY, INC. and
FIGGIE INTERNATIONAL INC.,
Petitioners,
v.
MARILYN M. MULHALL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

DOUGLAS S. MCDOWELL *
MCGUINESS & WILLIAMS
Suite 1200
1015 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 789-8600
Attorney for Amicus Curiae Equal Employment Advisory Council
* Counsel of Record

August 19, 1994

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v.

MARILYN M. MULHALL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

MOTION OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 37 of the Rules of this Court, the Equal Employment Advisory Council (EEAC) respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the petition of Advance Security, Inc. and Figgie International (herein "Advance"). Respondent Marilyn M. Mulhall declined EEAC's request for consent to file this brief. In support of this motion, EEAC by the following shows that its

brief brings relevant matter to the attention of this Court that has not been (or will not be) presented by the parties.

1. The Equal Employment Advisory Council is an association of employers organized to promote sound practical approaches to equal employment opportunity and affirmative action. Its membership comprises a broad segment of the private sector business community in the United States, including both individual corporations and trade associations, which themselves have hundreds of employer members interested in the foregoing purposes. The Council's governing body is a Board of Directors composed of experts in the field of equal employment opportunity. Their combined experience gives the Council an in-depth understanding of the practical, as well as the legal aspects of equal employment policies and requirements. The members of the Council are firmly committed to the principles of nondiscrimination and equal employment opportunity.

2. As employers, EEAC's members are subject to the Equal Pay Act, 29 U.S.C. § 206(a)(1), and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, both of which involve the "equal work" standard established by the Equal Pay Act, which is the basis of the plaintiff's suit in the instant case. EEAC participated as *amicus curiae* in *County of Washington v. Gunther*, 452 U.S. 161 (1981), one of the major Supreme Court cases construing the Equal Pay Act, its legislative history and its relationship to Title VII. EEAC also published E. Livernash, *Comparable Worth Issues and Alternatives* (1980), which was cited in *Gunther* as an example of the "scholarly debate" over sex-based wage discrimination issues. 452 U.S. at 166 n.6.

3. The instant case also involves the Equal Pay Act's affirmative defense which allows differentials in pay to male and female workers for doing equal work if the differential is "based on any other factor other than sex." EEAC filed a brief in *Kouba v. Allstate Insurance Co.*,

691 F.2d 873 (9th Cir. 1982), one of the leading cases construing that defense as it applies to an employer's reliance on prior salary as a factor in setting starting salaries for new employees.

4. In its decision below, the Eleventh Circuit allowed the plaintiff to compare her position with different jobs held by eight other company executives. Three of these executives previously owned companies which they had sold to Petitioners, and their starting salaries had been set as part of the negotiations when they sold their businesses. The Eleventh Circuit's analysis involved a determination of whether these executives' jobs were "comparable" to Respondent's. In so doing, the court below effectively resurrected the "comparable work" standard, which Congress rejected when it passed the Equal Pay Act.

5. The Eleventh Circuit also allowed Respondent to compare her job to the Controller's, even though he "manages money primarily and people secondarily; [and she] manages people and things primarily and money secondarily." Such an approach is so subjective that it would allow plaintiffs to find targets of opportunity with no standards to determine what jobs are comparable.

6. The Eleventh Circuit also held that when a pay suit is brought on the same facts under Title VII, the standard for comparing jobs is "relaxed," thus making wage comparisons easier under Title VII than under the Equal Pay Act. The decision thus would make it exceedingly difficult for employers to determine which jobs are "comparable" and would allow federal agencies, courts and juries to second-guess pay practices in a way that Congress never contemplated.

7. Thus, the decision below is contrary to the decisions of this Court and to the decisions of several circuits. It would allow plaintiffs to bring Equal Pay Act and Title VII suits to challenge pay decisions for different jobs, even in the absence of intentional discrimination.

By allowing Respondent to base her suit on the "intrinsic worth or difficulty" (*Gunther*, at 166) of her job as compared with that of the jobs of other executives doing different work, the Eleventh Circuit improperly has incorporated the "comparable worth" theory into federal law. Comparable worth, however, "has been banished from our jurisprudence." *Loyd v. Phillips Brothers, Inc.*, 25 F.3d 518, 525 n. 6 (7th Cir. 1994).

8. EEAC's ongoing interest in such issues is further demonstrated by its previous participation as *amicus curiae* in several other cases involving claims of sex-based compensation discrimination. *See Glenn v. General Motors Corp.*, 841 F.2d 1567 (11th Cir.), *cert. denied*, 488 U.S. 848 (1988); *Florida v. Long*, 487 U.S. 223 (1988); *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983); *American Nurses Ass'n v. State of Illinois*, 783 F.2d 716 (7th Cir. 1986); *AFSCME v. State of Washington*, 770 F.2d 1401 (9th Cir. 1985); *Spaulding v. University of Washington*, 740 F.2d 686 (9th Cir. 1984), *cert. denied*, 469 U.S. 1036 (1984); *Lemons v. City and County of Denver*, 620 F.2d 228 (10th Cir.), *cert. denied*, 449 U.S. 888 (1980); and *IUE v. Westinghouse Electric Corp.*, 631 F.2d 1094 (3d Cir. 1980), *cert. denied*, 449 U.S. 1009 (1980).

9. EEAC seeks to assist the Court in this case by highlighting the impact its decision may have beyond the instant case, particularly as it affects the salary and wage-setting practices of major employers. Accordingly, the brief brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties. Because of its significant experience, EEAC is uniquely situated to brief this Court on the relevant concerns of the business community and the significance of this case to employers generally.

WHEREFORE, for the reasons stated, the Equal Employment Advisory Council respectfully requests that the

Court grant its motion to participate in this case as *Amicus Curiae.*

Respectfully submitted,

DOUGLAS S. MCDOWELL *
MCGUINESS & WILLIAMS
Suite 1200
1015 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 789-8600
Attorney for Amicus Curiae
Equal Employment
Advisory Council

August 19, 1994

* Counsel of Record

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IN THE

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OCTOBER TERM, 1994

No. 94-123

ADVANCE SECURITY, INC. and
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v.

MARILYN M. MULHALL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council (EEAC) respectfully submits this brief *amicus curiae*, contingent upon the granting of the accompanying motion for leave. The brief supports the petition for a writ of certiorari.

INTEREST OF THE *AMICUS CURIAE*

EEAC is a national employers association representing a broad segment of the private sector business community. Its member representatives are experts (both human relations professionals and corporate labor counsel) responsible for corporate affirmative action and nondiscrimination policies. Their combined experience gives EEAC an in-depth understanding of the practical, as well as legal aspects of equal employment policies and requirements.

EEAC's members are subject to the requirements of the Equal Pay Act and Title VII of the Civil Rights Act of 1964, both of which prohibit certain types of sex-based compensation discrimination. Therefore, EEAC's members have a direct interest in the outcome of the instant case. The decision below allowed the plaintiff to compare her salary and other compensation with that of male executives doing "comparable" work. EEAC's members are concerned that the decision below improperly disregarded the "equal work" standard of the Equal Pay Act and resurrected the discredited theory of comparable worth.

Thus, the decision below directly affects EEAC's members, as it conflicts with several court decisions and is directly contrary to the language and purposes of the Equal Pay Act and Title VII.[1]

STATEMENT OF THE CASE

The plaintiff below, Marilyn Mulhall, alleged that she was subject to sex-based wage discrimination because she was paid less than male employees of her employer, Advance Security, Inc. ("Advance"). The case is factually complex because she has attempted to compare her wages with those of eight different male comparators in different jobs, and has sued under two different federal statutes—the Equal Pay Act (EPA)[2] and Title VII of the Civil Rights Act of 1964.[3]

Mulhall was Advance's Vice President of Administration. She performed a number of administrative functions.[4] She resigned her position in 1991. Her suit al-

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[1] The interests of EEAC are also set out in more detail in the attached motion to file this brief.

[2] 29 U.S.C. § 206(d).

[3] 42 U.S.C. § 2000e, *et seq.*

[4] Her duties included risk management, personnel, loss prevention, salary administration, workers compensation, purchasing,

leges that she was paid substantially less in salary, benefits and bonuses than eight male comparators in four comparator categories: (1) three managers working on two separate contracts with government agencies to provide security systems; (2) an individual hired to start up a new division, Investigations Corporation of America; (3) Advance's Vice-President, Controller, with overall responsibility for Advance's financial activities; and (4) three individuals who were owners or principles in businesses that were purchased by Advance and whose salaries with Advance were negotiated as part of the sale terms.

The district court below adopted the magistrate's Report and Recommendation to grant summary judgment dismissing plaintiff's Equal Pay Act and Title VII claims. Pet. App. A-35 to A-65.[5] The Eleventh Circuit, however, reversed the district court, except for the Category 2 claim where the circuit found that the job performed by the plaintiff was not substantially similar to that performed by the comparator. Pet. App. A-1 to A-34.

The Eleventh Circuit stated that "[t]he success of plaintiff's suit under both the EPA and Title VII rests on the comparison of her pay and job functions with those persons whom she designates as "comparators." Pet. App. A-6. The holdings of the courts below can be summarized as follows:

Category 1, Project Managers. Plaintiff alleged she was paid less than three male employees who manage projects to provide security at the Sandia National Laboratories in Tonapah, Nevada, and Livermore, California. The Eleventh Circuit reversed the district court's conclusion that the plaintiff's Equal Pay Act claims should be dismissed because the plaintiff worked in At-

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litigation, insurance programs, payroll, benefits, labor relations, licensing, leases, and corporate services. Pet. App. at A-5.

[5] "Pet. App." references are to the appendix to Advance's petition for writ of certiorari.

lanta, Georgia, and thus was not working in the same "establishment" as the comparators, as required by the EPA.

Category 2, Investigator. Neither the district court nor the Eleventh Circuit could accept Mulhall's argument that her compensation could be compared with William Hill's, who was hired from Wackenhut Corporation to head up a new division of Investigations. Both courts found that Mulhall did not state a *prima facie* EPA claim that her job was equal to Hill's, as Hill's job had different skills, effort, responsibility and working conditions: he was an investigator hired to create a new line of business and develop a new client base. (Pet. App. A-15 to A-17; A-45 to A-46).

Category 3, Controller. Mulhall then turned her sights on Larry Nelson, Advance's Controller—the company's "chief accounting/finance position . . . [with] responsibility for *all* of defendant Advance's financial and accounting functions." (Pet. App. A-47, emphasis in the original). The district court dismissed Mulhall's EPA claim as her administrative job was not equal to Nelson's financial job. *Id.*

The Eleventh Circuit framed the facts as follows:

> Defendants apparently believe that the ultimate responsibility for corporate money is greater in kind than the ultimate responsibility for administration of the business as a whole. *One vice president manages money primarily and people secondarily; the other manages people and things primarily and money secondarily.* [Pet. App. A-21, emphasis added].

Nevertheless, the circuit court did not agree with the district court that the duties were not substantially similar. The Eleventh Circuit observed that "Advance's economic well-being is the controller's main responsibility, but he also manages a staff and credit collection and billing—functions steeped in the administrative tradition." *Id.* at A-19. But it observed that "monetary concerns permeate all aspects of plaintiff's position." *Id.*

Category 4, Former Officials Of Purchased Businesses. Mulhall also felt she should have been paid the same as company officials who previously owned or were principals in security companies purchased by Advance and who stayed on as Advance's employees. They held different jobs than performed by Mulhall. Two of these men were Vice Presidents, Operations; the other was a Regional Manager. Pet. App. A-47 to A-48.

The district court found that the employer had proven a "factor other than sex" defense under the EPA, since "[t]he salaries of these three men were part of the consideration they received for the negotiated sale of their businesses to the defendant." Pet. App. A-49. The district court held that the EPA permitted Advance to "red circle" these wages for a period of time after these former officials sold their businesses to Advance. *Id.* at 50.

The Eleventh Circuit reversed the district court and held that the pay differential could not be justified by the "comparators' superior experience, training or ability, or exigent business circumstances. . . ." Pet. App. A-25. In rejecting the employer's "red circling" defense, the Eleventh Circuit stated that it knew of no court decision:

> explicitly extending the red-circling affirmative defense to a situation involving *new* employees paid higher wages than existing employees in *comparable* jobs.[6]

The court also stated that it was convinced by the legislative history of the EPA that the red-circle defense did not apply:

> where a plaintiff makes a *prima facie* case of discriminatory wage differential between herself and new employees brought into the organization to fill *comparable positions.* [Pet. App. A-23, emphasis added].

Further, the Eleventh Circuit stated that the employer could not rely on the "market forces" that brought about

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[6] Pet. App. A-23, emphasis of "new" in the original; emphasis of "comparable" added.

the purchase agreements for the merged companies, because the employer did not make post-hiring salary adjustments to reflect the plaintiff's superior performance. Pet. App. A-24. The court's decision stated that the company's argument "comes precariously close to the market force justification for disparate wages long rejected as a legitimate affirmative defense, citing *Corning Glass Works v. Brennan,* 417 U.S. [188,] at 205 [(1974)]." Pet. App. A-24 n.22.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The decision below effectively substitutes a "comparable work" standard for the "equal work" standard of the Equal Pay Act and Title VII. It thereby opens the door to wide-ranging attacks on employers' compensation systems, especially for highly-placed executives performing admittedly different job tasks and functions. None of the "comparator" jobs in this case could be said to be "equal" to Mulhall's job. Yet, the Eleventh Circuit allowed the jobs to be compared to see whether they were "comparable." This analysis is directly contrary to the history of the EPA, which shows that Congress deleted the "comparable work" test from the bill and substituted the "equal work" standard in order to limit EPA suits to comparisons of jobs that involved the same job tasks or functions. *County of Washington v. Gunther,* 452 U.S. 161, 184-89 (1981) (Rehnquist, J., dissenting).

The decision below also conflicts with the holdings of other circuits, in that it applies the shifting burden of proof scheme of *McDonnell Douglas v. Green,* 411 U.S. 792, 802 (1973). The court below held that "the standard for 'similarity', under the Equal Pay Act is *"relaxed"* when the suit is analyzed under Title VII. Other circuits, however, have held that in the absence of intentional wage discrimination, the Equal Pay Act's equal work standard applies equally to Title VII suits. *Spaulding v. University of Washington,* 740 F.2d 686, 700 (9th Cir.), *cert. denied,* 469 U.S. 1036 (1984). Similarly, the *McDonnell Douglas* "approach would inject into the liability analysis notions

of comparable worth which under prevailing statutory conditions have been banished from our jurisprudence." *Loyd v. Phillips Brothers, Inc.*, 25 F.3d 518, 525 & n.6 (7th Cir. 1994).

Finally, the Eleventh Circuit's rejection of the employer's "factor other than sex" defense for setting the wages of three former business owners as part of the negotiated consideration for the purchase of these executives' businesses raises important issues warranting this Court's review. EEAC's members are extremely concerned that the decision below will make it virtually impossible to negotiate salaries in the labor market based upon experience, training, ability or exigent, business-related circumstances, without having those salaries second-guessed under the Equal Pay Act or Title VII.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS' DECISION ALLOWING A PLAINTIFF IN A SEX-BASED PAY DISCRIMINATION CASE TO ALLEGE THAT SHE WAS PAID DIFFERENTLY THAN MEN WHO PERFORM DIFFERENT BUT "COMPARABLE" JOBS IS CONTRARY TO THE PROVISIONS OF THE EQUAL PAY ACT AND TITLE VII, CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS, AND CREATES NEEDLESS CONFUSION OVER WHAT LEGITIMATE FACTORS MAY BE USED TO DIFFERENTIATE PAY, PARTICULARLY IN UPPER-LEVEL MANAGEMENT POSITIONS

A. Introduction

The court below permitted a wide-ranging attack on an employer's pay practices by allowing the plaintiff to compare her pay with that of several executives who performed different job tasks and functions. The only common theme in her allegations was that she was paid less than the male comparators. The dissonance of her arguments is found in the wide disparity in the job tasks she sought to compare.

By permitting such an unstructured approach to sex-based pay discrimination cases, the decision below leaves employers vulnerable to *ad hoc* and arbitrary comparisons of the salaries of different jobs and makes it impossible to predict which comparisons are appropriate. Thus, if the decision below stands, even the most conscientious employer will be unable to predict which jobs should be compared, much less whether a jury, judge or governmental agency will agree with the employer's comparisons.

The law prohibits intentional, sex-based wage decisions. It also requires that persons performing substantially the same job tasks or functions be paid the same unless the pay differential is based on reasons unrelated to the sex of those who hold the jobs. The decision below, however, allows the types of wage comparisons that Congress and the Courts repeatedly have said are not permitted under federal law.

B. When It Crafted The Equal Pay Act, Congress Intentionally Deleted Language That Would Have Required The Same Pay For "Comparable" Work. Congress Substituted The "Equal" Work Standard To Limit Comparisons To Substantially Similar Jobs

It is well-accepted that "[t]he controlling factor under the Equal Pay Act is job content—the actual duties of the job." *Waters v. Turner, Wood & Smith Ins. Agency, Inc.*, 874 F.2d 797 (11th Cir. 1989) (rejecting plaintiff's "bootstrapping argument" that "inside" and "outside" sales positions were equal). *Accord Horner v. Mary Institute*, 613 F.2d 706, 714 (8th Cir. 1979) (although "superficially identical," the plaintiff did not prove that the actual job requirements and performance as a physical education teacher were the same as a male physical education teacher).

The Eleventh Circuit, however, departed from these principles in several ways in this case, thereby permitting comparisons under the Equal Pay Act of jobs that clearly

were not the same. Indeed, the court's opinion explicitly indicates at several points that a *prima facie* case of discrimination can be based on evidence that the employer paid different wages to employees working in jobs deemed merely "comparable." The court thus skipped over the requisite determination of whether these jobs were "equal" and jumped directly to a comparison of the overall skill, effort and responsibility required in the respective jobs.

In enacting the Equal Pay Act and Title VII, however, Congress did not permit the courts or administrative agencies to find a *prima facie* case of sex-based wage discrimination based on a comparison of different, albeit "comparable" jobs. Those statutes were not designed to substitute judicial determinations for business judgments and market processes.

Indeed, it was specifically because Congress did not want the courts and federal agencies to become mired in making comparisons of different jobs that it adopted the "equal work" standard. The Equal Pay Act was the result of an intensive and wide-ranging inquiry into pay discrimination against women. Although the widespread problem that Congress addressed was copiously documented, "[t]he most notable feature of the history of the Equal Pay Act is that Congress recognized early in the legislative process that the concept of equal pay for equal work was more readily stated in principle than reduced to statutory language which would be meaningful." *Corning Glass Works v. Brennan*, 417 U.S. 188, 198 (1974).

The original language in the legislation in 1962 would have authorized broad involvement by the courts in situations of alleged wage discrimination by requiring equal pay for "comparable work."[7] In 1962, however, the

[7] Congress deleted the word "comparable" in the Equal Pay Act and substituted the "equal work" standard. A complete discussion of the relevant legislative history of this change is found in Chief Justice (then-Justice) Rehnquist's dissenting opinion in *County of Washington v. Gunther*, 452 U.S. 161, 184-189 (1981). This history shows that, in Congress' view, "government intervention to equalize

House deleted the "comparable work" standard and substituted the "equal work" standard. In introducing the new language, Rep. St. George explained that there is a great difference between the terms equal and comparable: "The word 'comparable' opens up great vistas. It gives tremendous latitude to whoever is to be the arbitrator in these disputes." [8] Congress, therefore, prevented the courts from making wage comparability determinations.

The 1963 House debates repeated this theme. Rep. Goodell stated:

> I think it is important that we have clear legislative history at this point. Last year when the House changed the word "comparable" to "equal" the clear intention was to narrow the whole concept. We went from "comparable" to "equal" meaning that the jobs involved would be *virtually identical,* that is, they would be very much alike or closely related to each other.

109 Cong. Rec. 9197 (1963). In the several instances where the Eleventh Circuit allowed the plaintiff to determine the comparability of jobs to establish a *prima facie* case, its analysis was directly at odds with the language, purposes and history of the Equal Pay Act.

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wage differentiation was to be undertaken only within one circumstance: when men's and women's jobs *were identical or nearly so . . .*" *Id.* at 188. A full exposition of this issue also is found in E. Livernash, *Comparable Worth: Issues and Alternatives,* Equal Employment Advisory Council (1980), at 212-221, which was cited in *Gunther* as an example of the "scholarly debate" over wage discrimination issues. 452 U.S. at 160 n.6.

[8] 108 Cong. Rec. 14767 (1962). See also the remarks of Rep. Landrum, *id.* at 14768, who stated that the "equal work" amendment would prevent "the trooping around all over the country of employees of the Labor Department harassing business with their various interpretations of the term 'comparable' when 'equal' is capable of the same definition throughout the United States."

C. The Eleventh Circuit Improperly Compared The Skill, Effort And Responsibility Of "Comparable" Jobs In Violation Of The "Equal Work" Standard

With respect to the Controller's job, the Eleventh Circuit found that the jobs could be equal, even though "[o]ne vice president manages money primarily and people secondarily; the other manages people and things primarily and money secondarily." Pet. App. A-21. The court seems to feel that these jobs could be compared because both involved administrative tasks and various degrees of monetary functions.

But the record clearly indicates that Mulhall did numerous jobs that were *not* done by the Controller.[9] And the Controller was responsible for the defendant's accounting and financial functions, including credit collection and bills—tasks which were not required of Mulhall. In light of these differences in job functions, the court of appeals clearly erred in holding that the plaintiff had made out a *prima facie* case under the Equal Pay Act.

The Eleventh Circuit's decision thus conflicts with numerous other decisions, which are set out in *Ratts v. Business Systems*, 686 F. Supp. 546, 550 (D.S.C. 1987), which rejected plaintiffs' attempts to show that "executive jobs were of equal importance to the success of the company." As the court stated, "the fact remains that the *duties* of the vice presidents were not sufficiently similar." *Id.* at 550. The court in *Ratts* explained:

> While all vice presidents performed similar tasks such as supervision of employees, corporate decision making, participation in trade shows and the general goal of selling a product, each executive performed different and additional duties which resulted in their jobs not being substantially equal. The task of comparing executive/management positions is a difficult

[9] She was responsible for risk management, personnel, loss prevention, salary administration, workers compensation, litigation, insurance programs, payroll, benefits, labor relations and corporate services. Pet. App. at A-5.

> one. *Allegations of Equal Pay Act violations have routinely been rejected by courts applying the equal work standard to jobs involving executive and management positions.*

686 F. Supp. at 550 (emphasis added) and cases there cited.[10]

D. The Eleventh Circuit Applied An Improper Burden Of Proof In Holding That The Equal Work Standard Is "Relaxed" When Applied Under Title VII. This Approach Conflicts With The Decisions Of Other Circuits And, As The Seventh Circuit Stated, Opens The Door To "Comparable Worth Claims" Under Title VII

Employers also are concerned about the burden of proof analysis used by the Eleventh Circuit to analyze the plaintiff's Title VII claims. Instead of applying the "equal work" standard, the court stated that a plaintiff can make a Title VII *prima facie* case by "showing that she is a female and her job is *substantially similar* to higher paying jobs occupied by males." A-27 (emphasis added). The court also ruled that "the standard for 'similarity' under the Equal Pay Act is *relaxed*." A-27 (em-

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[10] We also are concerned that the decision below would bolster an attempt to modify the equal work standard based on a "sliding scale" analysis using "some degree of comparability plus some combination of [other] factors." *Spaulding v. University of Washington*, 740 F.2d 686, 701 (9th Cir.), *cert. denied*, 469 U.S. 1036 (1984). In rejecting this approach, the Ninth Circuit stated it would pose the danger of "plunging courts into standardless supervision of employer/employee relations." 740 F.2d at 701.

This case provides a good example, where the court below observed that Mulhall was responsible for monitoring EEO and affirmative action policies, and that a discrimination suit could have a devastating financial impact on the company. Pet. App. A-21 at n.19. Or course, the same could be said of most corporate executives performing different jobs posing a threat of high potential liability, such as directors of benefits, occupational safety and health, or corporate securities. There is nothing in the Equal Pay Act that allows comparisons to be made based upon the financial liability that could result from poor performance of different work.

phasis added), citing *Miranda v. B&B Cash Grocery Store*, 975 F.2d 1518, 1526 (11th Cir. 1992).

In reaching this conclusion, the court below misapplied the burden of proof analysis for disparate treatment cases found in *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973). *McDonnell Douglas* establishes a 3-step burden of proof scheme: plaintiff's *prima facie* case; articulation of the employer's legitimate reasons; and plaintiff's proof of employer pretext. The Eleventh Circuit's burden of proof scheme, however, raises conflicts with the decisions of this Court and other circuits that should be resolved by this Court.

In *County of Washington v. Gunther*, 452 U.S. 161 (1981), this Court rejected arguments that Title VII and the Equal Pay Act were on all fours in the types of sex-based compensation claims that could be brought under federal law. *Gunther* held that Title VII was broader than the Equal Pay Act in that plaintiffs could bring suits for "intentional" or "blatantly discriminatory practices" even when the plaintiff might not be able to meet the equal work standard. Contrary to the decision below, however, *Gunther* did not hold that the "equal work" standard is "relaxed" when that standard is used under Title VII. Pet. App. A-27.

After this Court's decision in *Gunther*, the Ninth Circuit unequivocally reconfirmed its earlier holding that:

> Under *Gunther*, it is certain that if the nursing faculty were to base its [Title VII] *prima facie* case only on a comparison of the work performed, it would have to show substantial equality, 623 F.2d at 1321. We stated that "because a comparable work standard, cannot be substituted for an equal work standard *evidence of comparable work*, although not necessarily irrelevant in proving discrimination under some alternative theory, *will not alone be sufficient to establish a prima facie case.*" *Id.* Thus, the nursing faculty has failed to establish a Title VII claim on an equal pay for equal work theory for the same

> reasons that we concluded it failed to establish a *prima facie* Equal Pay Act claim.

Spaulding v. University of Washington, 740 F.2d at 700.[11]

Spaulding thus cited to the Ninth Circuit's earlier supplemental opinion in *Gunther*, 623 F.2d 1303, 1321 (9th Cir. 1979). There, the Ninth Circuit also explained its holding:

> The effect of our decision will not be to substitute a "comparable" work standard for an "equal" work standard. Where a Title VII plaintiff claiming wage discrimination attempts to establish a *prima facie* case based solely on a comparison of the work she performs, *she will have to show that her job requirements are substantially equal, not comparable, to that of a similarly situated male.*

Id. (emphasis added).

In contrast, as Advance forcefully and correctly argues in its petition, the Eleventh Circuit essentially adopted the "comparable worth" theory in this case when it allowed this suit to proceed based on a comparison of different job functions and tasks. "Comparable worth" is the "controversial concept":

> under which plaintiffs might claim increased compensation on the basis of a comparison of the intrinsic *worth or difficulty* of their job with that of other jobs in the same organization or community.

Gunther, 452 U.S. at 166 (emphasis added). The Eleventh Circuit's meager response to this argument—that "plaintiff's argument does not, by definition, depend on comparable worth . . ." (A-24)—reflects the Court's fundamental failure to understand the difference between the "comparable" and "equal" work standards.

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[11] Judge Schroeder's specially concurring opinion agreed with the majority that "the plaintiffs in this case did not prove any violation of the Equal Pay Act because they failed to show that their jobs were substantially equal to the comparator jobs used." 740 F.2d at 709.

Without repeating the facts of this case, however, the record is replete with Mulhall's attempt to show that her job was just as "difficult," valuable or responsible as different jobs held by male executives. The Eleventh Circuit also made repeated comparisons of the profitability of various jobs, apparently to show how much they were worth to the employer. *See, e.g.*, Pet. App. A-24 n. 23. Thus, the planitiff's case and the Eleventh Circuit's analysis falls squarely within this Court's definition of "comparable worth." The Eleventh Circuit's decision thus conflicts with numerous other circuit decisions rejecting "comparable worth" as a viable theory of liability under Title VII. *See, e.g., Loyd v. Phillips Brothers, Inc.*, 25 F.3d 518, 525 (7th Cir. 1994); *AFSCME v. State of Washington*, 770 F.2d 1401, 1406 (9th Cir. 1985); *Int'l Union, UAW v. Michigan*, 886 F.2d 766, 769 (6th Cir. 1989).

Recently, the Seventh Circuit recognized that the burden of proof approach used by the court below, particularly reliance on the *McDonnell Douglas* structure, improperly injects notions of comparable worth into pay discrimination cases. Thus, the Seventh Circuit ruled that although Title VII allows pay discrimination suits where the equal work standard has not been met:

> There must be an intent to discriminate and the intent must encompass an actual desire to pay women less than men because they are women. . . . When comparing male and female remunerations in dissimilar jobs, this becomes a rather demanding standard, whose particularity does not allow for proof via an assumption-laden scheme of *prima facie* cases, presumptions and rebuttal, but rather requires that the plaintiff persuade the fact-finder that a sex-based compensation program was at work.

Loyd v. Phillips Brothers, Inc., 25 F.3d 518, 525 (7th Cir. 1994).

As "contra" authority, the Seventh Circuit cited to the Eleventh Circuit's decision in *Miranda v. B&B Cash*

Grocery Store, which the Eleventh Circuit in the instant case cited as authority for using the *McDonnell Douglas* standard. Pet. App. A-27. Judge Flaum's decision explained how the Eleventh Circuit's approach could lead to "comparable worth":

> Our point is that the *McDonnell Douglas* burden-shifting scheme does not import well into an area where wage discrimination claims are based on pay differences between dissimilar jobs. *The approach would inject into the liability analysis notions of comparable worth which under prevailing statutory conditions, have been banished from our jurisprudence.* A Title VII wage-discrimination plaintiff comparing wage rates in dissimilar jobs retains at all times the burden of convincing the fact finder, without resort to shifting burdens or similar procedural devices, that her employer intended to suppress her wages on account of her sex (or other protected characteristics).

25 F.3d at 525 n. 6 (emphasis added).

Under these conflicting decisions, employers with nationwide operations will face extreme difficulties in determining how to evaluate their pay practices for compliance with the Equal Pay Act and Title VII. Given these direct conflicts with the decision below, the instant case should be reviewed in order to clarify the appropriate burden of proof for wage discrimination claims under Title VII.

E. The Eleventh Circuit's Narrow Reading Of The "Factor Other Than Sex" Defense Eliminates Many Legitimate Factors Permitted By Other Court Decisions And Creates Confusion In Designing Permissible Salary Systems

As noted, the court below refused to credit the employer's "factor other than sex" defense in setting the salaries of three of its executives. The employer argued that:

> the comparators were formerly owners or principals in businesses purchased by Advance and their salaries were set as part of the negotiated sale of the business.

Pet. App. A-22. The court of appeals, however, stated that the employer had not cited to any case extending the "red circling" defense to a situation where the employer paid a *new* employee higher wages than existing employees in "comparable jobs." Pet. App. A-23. This analysis conveniently overlooks the fact that the Equal Pay Act does not even apply to pay differentials in "comparable" jobs. See above, pp. 8-12. As the plaintiff has not even established a *prima facie* case, the Equal Pay Act defenses should not even come into play.

Moreover, the Eleventh Circuit stated that the new employees' "superior experience, training or ability, or exigent business circumstances" could not justify their greater compensation, as compared with Mulhall's relatively better performance both before and after the comparators arrive at the company. Pet. App. A-25. This holding of the Eleventh Circuit directly conflicts with another holding in the same circuit which states:

> The legislative history [of the Equal Pay Act] indicates that the "factor other than sex" exception applies when the disparity *results from unique characteristics of the same job; from an individual's experience, training, or ability; or from exigent circumstances connected with the business.*

Glenn v. General Motors Corp., 841 F.2d 1567, 1571 (11th Cir.) (emphasis added), *cert. denied*, 488 U.S. 848 (1988).

Moreover, it is evident that the Eleventh Circuit's analysis is overly rigid and would jeopardize many common, legitimate pay practices that are sex neutral. Thus, the "factor other than exception was intended by Congress to be a 'broad general exception.'" *EEOC v. Maricopa County Community College Dist.*, 736 F.2d 510, 514 (9th Cir. 1984).

In addition, the "factor other than sex" exception is not limited to factors such as the difficulty or type of duties that actually are needed to perform the job in question. *Kouba v. Allstate*, 691 F.2d 873, 876-77 (9th Cir. 1982). An employer can rely on a wage-setting factor based on "an acceptable business reason" as long as the factor is used "reasonably in light of the employer's stated purposes as well as its other practices." *Id.* at 877.

For example, Aetna Insurance Company hired a new underwriter with over 15 years of underwriting experience. The EEOC argued that Aetna violated the Equal Pay Act because a female underwriter was paid less for performing the same job. The court accepted Aetna's sex-neutral explanation that it had different compensation systems for existing and new employees.[12] In rejecting the EEOC's argument that the salary program was too subjective, the Fourth Circuit stated:

> Aetna needed an experienced casualty underwriter to fill the void . . . but, more importantly, it needed an agent to expand its business in the commercial casualty field. Archer had a strong background in the commercial casualty area; he had supervisory experience; and he demonstrated in his interview that he had the personality traits to succeed as an underwriter and later as a manager.[13]

Numerous other courts have approved employer wage-retention policies that were applied neutrally and relied on factors that did not involve sex. *Covington v. Southern Illinois University*, 816 F.2d 317 (7th Cir.), *cert. denied*, 484 U.S. 848 (1987) (approved university's policy of retaining employees' salaries upon change of assignment); *Christiana v. Metropolitan Life*, 839 F. Supp. 248 (S.D.N.Y. 1993), and cases there cited (upholds company-wide and location-wide salary retention policies); *Derouin v. Louis Allis Division, Litton Industrial Products, Inc.*, 618 F. Supp. 221, 225 (E.D. Wis. 1984) (Employer may legitimately encourage "nonsupervisory pro-

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[12] *EEOC v. Aetna Insurance Co.*, 616 F.2d 719 (4th Cir. 1980).

[13] 616 F.2d at 726.

duction employees with high wage rates to apply for supervisory positions without taking pay cuts").[14]

Moreover, the "factor other than sex" exception seems ideally suited for the instant case. The three comparators were former owners and principals of businesses which they sold to Advance. Presumably their new wages at Advance did not simply include payment for work to be performed post-sale. Their wage levels would have included consideration for providing Advance with a going concern, remuneration for the assets and good will of the business, and reward for all risk and initiative in starting up and maintaining a successful business enterprise.[15]

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[14] Other cases approving similar wage retention policies include: *Grove v. Frostburg National Bank*, 549 F. Supp. 922, 937 (D.Md. 1982); *Groussman v. Respiratory Home Care, Inc.*, 40 Fair Empl. Prac. Cas. (BNA) 122 (C.D.Cal. 1986); *Riordan v. Kempiners*, 831 F.2d 690, 699 (11th Cir. 1987); *Gosa v. Bryce Hospital*, 780 F.2d 917 (11th Cir. 1986); *Ciardella v. Carson City School Dist.*, 671 F. Supp. 699, 701 (D.Nev. 1987); *Blocker v. AT&T Technology Systems*, 666 F.Supp. 209, 214 (M.D.Fla. 1987) (policy not based on sex and appears reasonable in order to enhance the desirability of employment and to provide security for employees); *Mangiapane v. Adams*, 20 Fair Empl. Prac. Cases (BNA) 699 (D.D.C. 1979); *Hodgson v. Lenkurt Electric Co.*, 20 WH Cases 1044 (N.D. Cal. 1972); *EEOC v. Samedan Oil Corp.*, 29 Empl. Prac. Dec. (CCH) ¶ 32,901 (E.D. Okla. 1982); *Adams v. Univ. of Washington*, 722 P.2d 74 (Wash.Sup.Ct. 1986) (permissible to maintain wage rates of skilled employees in economic reorganization in order to mitigate effects of demoralizing wage adjustment during reassignment of job functions); *Bence v. Detroit Health Corp.*, 712 F.2d 1024, 1029-30 (6th Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984). *See also Hodgson v. Robert Hall Cloths, Inc.*, 473 F.2d 589, 594-96 (3d Cir. 1973), *cert. denied sub nom. Brennan v. Robert Hall Clothes, Inc.*, 414 U.S. 866 (1973).

[15] In response to Advance's argument that these wages were part of the larger negotiation picture surrounding the purchase of the comparator's businesses, the Eleventh Circuit stated that this argument "comes precariously close to the market force justification for disparate wages long rejected as a legitimate affirmative defense. *Corning Glass Works*, 417 U.S. at 205." Pet. App. A-24 n.22. *Corning Glass*, however, rejected a defense based on the fact that the sex-based "differential arose simply because men would not work at the low rates paid women inspectors, and it reflected a job

In short, the Eleventh Circuit's decision greatly confuses the law applicable to employer pay practices. Not only did the court allow the plaintiff to compare her job tasks and performance with comparators who did different work, the court then refused to allow the employer to justify its pay practices by relying on legitimate factors that were completely neutral and unrelated to sex. This decision thus brings into question the legitimacy of common business practices used to set the salaries of executives hired from outside the company. The conflicts between the court below and other circuits should be resolved by this Court.

CONCLUSION

For the foregoing reasons, EEAC respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

DOUGLAS S. MCDOWELL *
MCGUINESS & WILLIAMS
Suite 1200
1015 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 789-8600

Attorney for Amicus Curiae
Equal Employment
Advisory Council

* Counsel of Record

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market in which Corning could pay women less than men for the *same work*." 417 U.S. at 205 (emphasis added).

In the instant case, Mulhall and the comparators were performing *different* work. Moreover, there is nothing in the record to show that, similar to the night shift differential in *Corning Glass*, there was a pay policy specifically based on sex. Accordingly, absent a showing of intent to discriminate on the basis of sex, the courts routinely have permitted employers to rely upon the labor market to set wages for different jobs. *See, e.g., Christensen v. State of Iowa*, 563 F.2d 353 (8th Cir. 1977); *Lemons v. Denver*, 783 F.2d 716 (10th Cir.), *cert. denied*, 449 U.S. 888 (1980); *Spaulding v. State of Washington*, 740 F.2d 686; *AFSCME v. State of Washington*, 770 F.2d 1401, 1404 (9th Cir. 1985); and *UAW v. Michigan*, 886 F.2d 766, 769 (6th Cir. 1989).